United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

JANUARY TERM, 1909.

No. 1987.

627

THEODORE ALBERT MAYER, APPELLANT,

vs.

AMERICAN SECURITY & TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF THEODORE J. MAYER, DECEASED; WASHINGTON LOAN & TRUST COMPANY, TRUSTEE, AND GEORGE WASHINGTON UNIVERSITY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED FEBRUARY 2, 1909.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

JANUARY TERM, 1909.

No. 1987.

THEODORE ALBERT MAYER, APPELLANT,

vs.

AMERICAN SECURITY & TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF THEODORE J. MAYER, DECEASED; WASHINGTON LOAN & TRUST COMPANY, TRUSTEE, AND GEORGE WASHINGTON UNIVERSITY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 2, 1909.

In the Court of Appeals of the District of Columbia.

No. 1987.

THEODORE ALBERT MAYER, Appellant,
vs.
AMERICAN SECURITY & TRUST COMPANY, Executor, &c., ET AL.

a Supreme Court of the District of Columbia.

No. 28094. Equity.

THEODORE ALBERT MAYER, Complainant,
vs.
AMERICAN SECURITY & TRUST COMPANY, Executor and Trustee under the Last Will and Testament of Theodore J. Mayer, Deceased, WASHINGTON LOAN & TRUST COMPANY, Trustee, and GEORGE WASHINGTON UNIVERSITY, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-mentioned cause, to wit:

1 *Bill.*

Filed October 16, 1908.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

No. 28094. Equity.

THEODORE ALBERT MAYER, Complainant,
vs.
AMERICAN SECURITY & TRUST COMPANY, Executor and Trustee under the Last Will and Testament of Theodore J. Mayer, Deceased, WASHINGTON LOAN & TRUST COMPANY, Trustee, and GEORGE WASHINGTON UNIVERSITY, Defendants.

To the Supreme Court of the District of Columbia, Holding an Equity Court:

The complainant respectfully states:

I.

That he is a citizen of the United States, and a resident of the City of Washington, District of Columbia.

II.

That the defendants, the American Security & Trust Company, and the Washington Loan & Trust Company, are corporations duly incorporated and organized under Acts of Congress of the United States, and engaged in business in the District of Columbia, with power to act as executors of wills and as trustees; that the
2 defendant, the George Washington University, is a corporation duly incorporated and organized under various Acts of Congress of the United States, and is conducting an educational institution in the District of Columbia; that the defendant, the American Security and Trust Company, is sued as executor and trustee under the last will and testament of Theodore J. Mayer, deceased, as hereinafter set forth; that the defendant, the Washington Loan & Trust Company, is sued in its own right as grantee under a certain deed from said Theodore J. Mayer, and as trustee under a certain trust agreement hereinafter mentioned; that the defendant, the George Washington University, is sued in its own right as the beneficiary under said trust agreement.

III.

That Theodore J. Mayer, late a citizen of the United States, and a resident of the District of Columbia, departed this life in said City and District, on the 16th day of March, 1907, possessed of a large amount of real and personal property other than the real estate with the improvements and personal property thereon hereinafter described and referred to as the Chevy Chase property and certain patent rights likewise hereinafter mentioned, leaving him surviving as his sole heir at law, a son, your complainant, and leaving a last will and testament bearing date the 15th day of February, 1907, which said last will and testament was thereafter, to-wit, on the 16 day of March, 1907, duly admitted to probate and record by the Supreme Court of the District of Columbia holding a Probate
3 Court; that in and by said last will and testament said testator constituted and appointed the defendant, the American Security and Trust Company the executor thereof and trustee thereunder; and letters testamentary have been duly issued to said Company by said Court, and, in virtue thereof, said Company, as executor and trustee under said will, has possessed itself of the real and personal estate of the said testator other than the Chevy Chase property and the patent rights heretofore and hereafter mentioned. A true copy of said last will and testament, duly certified, is hereto annexed, marked "Exhibit A", and prayed to be read as part hereof.

IV.

That in and by said last will and testament, as by reference thereto will appear, the said testator, after making various bequests in money, amounting in the aggregate to $80,000, by the twenty-first paragraph thereof, devised to your complainant his residence, No. 214 B Street, Southeast, and the adjoining lot and stable thereon, his horses, carriages, jewelry, pictures, etc., therein described, together with cer-

tain other personal property in said paragraph mentioned; and in and by said paragraph said testator further provided as follows:

"All the rest and residue of my estate, real, personal and mixed, which I now possess, or which may hereafter be acquired by me and wheresoever situate, I give, devise and bequeath unto the American Security and Trust Company, a corporation existing and doing business in the District of Columbia, under and by virtue of the authority of the laws in force therein, its successors and assigns."

And said will further provided that all the estate devised and bequeathed by said residuary clause, should be held by said defendant, in trust to pay over to your complainant, until he attains the age of thirty-three years, the sum of $300 per month, and upon attaining the age of thirty-three years, to pay your complainant the sum of $15,000; and upon attaining the age of thirty-six years, to pay him the further sum of $15,000 and upon attaining the age of thirty-nine years, to pay the further sum of $30,000 and upon attaining the age of forty-two years, to pay him the further sum of $30,000, and upon attaining the age of forty-five years, the further sum of $30,000, and upon attaining the age of forty-eight years, to transfer, convey and pay over to your complainant, all of the trust funds and subject in its hands remaining, to be by him taken and held absolutely and in fee simple. Said clause of said will further provided, that in the event of the death of your complainant before attaining the age of forty-eight years, leaving issue surviving, an allowance should be made by said trustee for the maintenance and education of such child or children until they respectively attain the age of twenty-seven years, at which time said testator directed the trust as to such child or children to cease and the said trustee to transfer and deliver to such child the trust estate, remaining in its hands, or if more than one child, then to each of them its distributive share of said estate. Said will further provided if such child or children should die before attaining the age of twenty-seven years, leaving no issue surviving, that his said estate should be distributed in the manner provided in the event your complainant should die before attaining the age of forty-eight years leaving no child or children surviving. And said testator in and by said will further provided that in the event of the death of your complainant before attaining the age of forty-eight years, leaving no child or children surviving, or descendant thereof, the said executor and trustee should pay over from the balance of his said estate then remaining, various legacies amounting in the aggregate to the sum of $205,000, and the balance, if any, in equal shares to various charitable and educational institutions therein mentioned.

V.

Upon information and belief your complainant charges that the real and personal estate of which said testator died seized and possessed and hereinbefore referred to, which came into the possession and control of the defendant, the American Security and Trust Company, as executor and trustee under said will, is more than suf-

ficient to satisfy and pay in full the several legacies directed to be paid by said testator, and all the just debts and funeral expenses of said testator and the expenses of administration of his estate.

6 VI.

That shortly prior to the execution of said last will and testament, to-wit, on the 5th day of February, 1907, the said Theodore J. Mayer, being seized and possessed of a certain piece or parcel of real estate situated in Montgomery County, State of Maryland, known and described as Block numbered 27, in Section numbered 3, of a subdivision made by the Chevy Chase Land Company of Montgomery County, Maryland, as per plat recorded in Liber J. A. No. 36, at Folio 61, of the land records of said County, together with the improvements, machinery, furniture, etc., upon said premises, conveyed the same by deed in fee simple absolute to the defendant, the Washington Loan and Trust Company. A true copy of said deed, is hereto annexed, marked "Exhibit B," and prayed to be read as part thereof.

VII.

That at or about the time of the execution of said deed, the said defendant, the Washington Loan & Trust Company, executed a declaration in trust, signed and assented to by the defendant, the George Washington University, and the said Theodore J. Mayer, which said declaration of trust is of the following tenor and effect:

"Whereas, Theodore J. Mayer, of the City of Washington, D. C., did on the 5th day of February 1907, execute a certain deed in fee simple to property known as all of Block numbered Twenty-seven (27) in Section numbered Two (2) of a Subdivision made by the Chevy Chase Land Company of Montgomery County, Mary-
7 land, being as per plat recorded in Liber J. A. No. 36 at folio 61, of the Land Records of Montgomery County, Maryland, together with the improvements thereon, machinery plant and furniture thereon, to the Washington Loan & Trust Company, of Washington, D. C., and although the said deed purports to convey to said grantee an absolute title to the said property the same is held by the Washington Loan & Trust Company for the use and benefit of the George Washington University of Washington, D. C., in and upon certain trusts which are hereby declared to be as follows, that is to say:

In trust.

1. To convey said property, in fee simple, to the said George Washington University, when and at such time as the said University shall acquire a fee simple to the property known as the "Dean or Oak Lawn Property," located North of Florida Avenue, between 19th Street and Connecticut Avenue, in the County of Washington, District of Columbia, as a site for its University Buildings, and through the action of its Board of Trustees, shall abandon the idea of retaining the site known as the Van Ness property, now owned by it, as the location of the said University.

2. That upon the conveyance of the said "Dean or Oak Lawn

Property" to the George Washington University, said University shall agree in writing, by authority of its Board of Trustees,
8 to erect upon the said "Dean or Oak Lawn Property" as a part of its group of University Buildings, a building of stone and brick to be used for educational purposes and to be designated, "The Susanna Mayer Memorial."

3. That said Theodore J. Mayer having given an option to one Elmer Gates for the purchase of said property located at Chevy Chase, hereinbefore described, which option expires on the 15th day of April, 1907, for the sum of One Hundred and Eighty-five Thousand Dollars ($185,000), it is understood that in the event of this option being accepted the said The Washington Loan & Trust Company, shall have full power to deed the same to the said Gates, in fee simple, or his assigns, and receive the purchase money or its equivalent and to hold said money in and upon the same trusts as hereinbefore and hereinafter expressed for the property itself.

4. In the event that The George Washington University shall acquire the "Dean or Oak Lawn Property," pending the sale or the disposition of the Chevy Chase property, it shall be kept fully insured, in good repair and the hedges and lawns properly trimmed by The George Washington University.

5. The intent and purpose of the said Theodore J. Mayer by his conveyance to The Washington Loan & Trust Company is to donate to The George Washington University the land known as
9 the Chevy Chase property hereinbefore more particularly described for the uses and purposes of said University, only upon condition, however, that the said University shall acquire the "'Dean or Oak Lawn Property," hereinbefore referred to, and shall use the same as the site of the George Washington University, and shall abandon the Van Ness property for this purpose, either by sale or direct notice action of its Board of Trustees, and with the proceeds of the sale of the said Chevy Chase land to erect upon the "Dean or Oak Lawn Property," a suitable educational building to be a memorial to the deceased wife of the said Mayer and to be designated "The Susanna Mayer Memorial," as aforesaid. This declaration of trust is intended to set forth the terms and conditions under which the said Chevy Chase property, or the proceeds thereof, is to be conveyed or given to the said The George Washington University.

6. And upon this further trust in the event of the failure of the said University to comply with the terms and conditions of this trust within a reasonable time after the execution of this instrument, which reasonable time is to be determined by the Trustee, when said property, so as aforesaid conveyed to the Trustee, is to be reconveyed to the said Theodore J. Mayer, his heirs or assigns.

In evidence of the acceptance of this trust by the George Washington University, it has caused this instrument to be signed by its President, attested by its Secretary, and its corporate seal
10 hereto affixed.

And, the said Theodore J. Mayer in approval of the terms

of the trusts herein expressed has also signed this instrument and affixed his seal hereto.

In testimony whereof, The Washington Loan & Trust Company has caused these presents to be signed by its President, attested by its Treasurer, and its corporate seal to be hereto affixed.

THE WASHINGTON LOAN AND TRUST COMPANY,
(Signed) By JOHN JOY EDSON, *President.*

Attested:
(Signed) ANDREW PARKER, *Treasurer.*

THE GEORGE WASHINGTON UNIVERSITY,
(Signed) By CHARLES W. NEEDHAM, *President.*

Attested:
(Signed) JOHN D. LARNER, *Sec'y.*"

VIII.

That at or about the time the deed to the Chevy Chase property was executed and delivered by the said Theodore J. Mayer to the said Washington Loan & Trust Company, hereinbefore mentioned, said Mayer, being at the time the owner of certain valuable patent rights, assigned the same to the defendant, The Washington Loan & Trust Company, to be held by said defendant upon the same trusts and subject to the same conditions set forth in said trust agreement dated February 5, 1907, concerning the Chevy Chase property. Your complainant is unable to give an accurate or correct description of the patent rights so assigned and does not know and has no means of ascertaining except by and through the defendant, the Washington Loan & Trust Company, whether any other or further instrument in writing was executed concerning said patent rights and the particular terms of the trust upon which the same were to be held, and he therefore calls upon said defendant to discover and set forth in its answer hereto a full and correct list and description of the patent rights assigned to it and a full, true and correct copy of any instrument in writing affecting said patent rights or setting forth the terms of the trusts upon which the same were conveyed to and are now held by it.

11

IX.

That the defendant, the Washington Loan & Trust Company, trustee under the trust instrument, hereinbefore mentioned, and pursuant to the authority therein contained, determined and fixed Oct. 15, 1908, as the reasonable time and date within which the defendant, the George Washington University, should comply with the conditions and stipulations of said trust agreement, and duly notified the defendant, the George Washington University, that in case of failure on its part to comply with such conditions on or before said

date, that it would, as required by the terms of said trust agreement, reconvey said property to the person or persons lawfully entitled thereto.

X.

That the defendant, the George Washington University
12 at the date of the execution of said deed and of said trust agreement, and until long subsequent to the death of said Theodore J. Mayer, believed that it would be able to perform the conditions in said trust agreement mentioned whereby it would become entitled to a conveyance of said property, and in good faith, with the intention and purpose of securing such conveyance, abandoned and sold the Van Ness property, in said trust agreement mentioned, as the location of said University, and in the life time of said Theodore J. Mayer entered into negotiations for the purchase of the Dean or Oak Lawn property also in said agreement mentioned, and continued such negotiations in good faith until long subsequent to the death of said Theodore J. Mayer, and pursuant to the authority of its Board of Trustees, made an offer to purchase the same but the owners thereof have declined and refused to sell the same to the said University and therefore it has never been able to secure the said property, and, upon information and belief complainant avers, said University has in fact definitely and finally abandoned its purpose for the reason aforesaid to acquire said property and because thereof, and because the time fixed by the defendant the Washington Loan & Trust Company, for the purchase of said Dean property has elapsed, and thereupon, it became and was and still is the duty of said Washington Loan & Trust Company, as required by the terms of said agreement, to reconvey said property, to the "heirs or assigns" of said Theodore J. Mayer.

13 XI.

Your complainant avers that he is the son and sole heir at law of said Theodore J. Mayer, and as such is the person to whom said property should be conveyed as provided by the terms of said trust agreement, and accordingly he has demanded of the defendant, the Washington Loan & Trust Company, to make such conveyance to him; nevertheless, your complainant charges, the said defendant, while expressing its desire to perform its full duty in the premises, refuses to make such conveyance until the right of your complainant thereto has been judicially determined, because, as it says, the defendant, the American Security & Trust Company, has notified it not to make such conveyance, claiming that the title to said trust property passed to it under the residuary clause of the last will and testament of said Theodore J. Mayer and is to be held by it as trustee under said will for your complainant until he attains the age of forty-eight years.

XII.

Your complainant charges that said Theodore J. Mayer, at the time of the execution of said will had been informed and believed, and this belief continued until his death, that the defendant, the

George Washington University, would be able to fulfill the conditions stipulated by said trust agreement, and become entitled to a conveyance of said property; that by the express terms of said trust agreement he directed said property, in the event of his death, to be reconveyed to his heirs or assigns; that said last will and testament was not in fact or in law an assignment of said property or
14 of any rights thereto and was not so intended by said testator; that default in the performance of the condition authorizing and requiring a reconveyance of said property did not occur until long subsequent to the death of the said Theodore J. Mayer; that the said testator was not possessed of such an interest in said property at the time of the execution of the said will or at the time of his death that could be devised by his last will and testament; that he was not possessed of any estate therein at the time of the execution of said will nor was any estate therein thereafter acquired by him during his lifetime; and even if it were the purpose of said testator to devise and bequeath said property by said last will and testament, which your complainant denies, nevertheless he says that said testator did not use apt or sufficient words for that purpose.

XIII.

Your complainant charges that the defendant, the George Washington University, by its failure to perform the conditions entitling it to a conveyance of said property has no longer any interest therein, but as said fact does not appear of record, said University is made defendant hereto for the purpose of having its default in said respect judicially established.

XIV.

That the said testator, in his lifetime, had given to one Elmer Gates an option in writing to purchase said Chevy Chase property and the improvements thereon and said patent rights as set forth in the trust agreement hereinbefore mentioned; that said option has, since the death of said testator, and with the consent of all
15 parties in interest, been extended from time to time and finally, on January 9, 1908, the same was, with like consent extended to June 15, 1908, in consideration of the payment by said Gates to the defendant, the Washington Loan and Trust Company, of the sum of $2500 as rental for said property between January 9, 1908, and the 15th day of June, 1908, with the agreement that, upon the payment by said Gates to the defendant, the Washington Loan and Trust Company, of the additional sum of $2500 as rental, on or before June 15, 1908, to further extend said option until December 15, 1908: That such additional sum has not been paid and said option has not been extended.

XV.

That since the death of said Theodore J. Mayer, a large amount of rent, amounting to approximately $6,000, has been collected from the tenant in possession, by the defendant, the Washington Loan and Trust Company; that said property is improved by various build-

ings containing a large amount of valuable machinery, furniture, and other personal property, in excess of $10,000.00 in value and the same has a substantial rental value; that it is necessary that some suitable person or corporation should be vested with authority to care for said property pending the determination of the rights of the parties in interest, to collect and hold the rents received on account thereof and to keep said property insured. Your complainant therefore charges that pending the disposition of this suit a receiver should be appointed and your complainant expresses his willingness that the defendant, the Washington Loan and Trust Company, should be appointed for that purpose.

16

XVI.

Your complainant says that he is wholly without remedy except in this Honorable Court where alone his rights and the rights of the defendant, the American Security & Trust Company, as executor and trustee, arising out of the facts aforesaid, in reference to said real estate, personal property, and patent rights, can be determined.

Wherefore, your complainant prays—

First. That a writ of subpœna may be issued out of and under the seal of this court directed to said American Security and Trust Company, as executor and trustee under the last will and testament of Theodore J. Mayer, the Washington Loan and Trust Company, as trustee, and the George Washington University, whom your complainant prays may be made defendants thereto, commanding them to appear and answer the exigencies of this suit, but not under oath, answer under oath being expressly waived.

Second. That said last will and testament of Theodore J. Mayer, so far as may be necessary for the purposes of this suit, and said trust agreement executed by the Washington Loan and Trust Company, may be construed by this court and the rights of the parties hereto fully determined.

Third. That your complainant may be adjudged to be the owner of all the property covered by said trust agreement and conveyed to the defendant, the Washington Loan and Trust Company, together with rents which have been received on account thereof since the death of Theodore J. Mayer, and that said defendant, the Washington Loan and Trust Company, may be enjoined and directed to convey the same to your complainant.

17

Fourth. That the defendant, the American Security and Trust Company, may be enjoined from setting up any adverse title or claim of any nature either as executor and trustee under said last will and testament or otherwise to said property covered by said trust agreement or any part thereof.

Fifth. That in the meantime pending this suit a receiver may be appointed to take charge of said property, real and personal, collect the rents thereof and deal with the same generally in such manner as may be for the interest of the parties concerned, under the supervision and direction of this Honorable Court.

Sixth. That your complainant may have such other and further relief as the nature and circumstances of the case require and to this Honorable Court shall seem proper.

THEODORE ALBERT MAYER.

BRANDENBURG & BRANDENBURG,
Solicitors for Complainant.

DISTRICT OF COLUMBIA, *ss:*

Theodore A. Mayer, upon oath says: That he has read the foregoing bill of complaint by him subscribed and knows the contents thereof; that the things therein stated upon his personal knowledge are true and those stated upon information and belief he believes to be true.

THEODORE ALBERT MAYER.

18 Subscribed and sworn to before me this 15th day of October, 1908.

[SEAL.] LLOYD A. DOUGLASS,
Notary Public, D. C.

EXHIBIT "A."

I, Theodore J. Mayer, of the City of Washington, District of Columbia, being of sound and disposing mind, do make, publish and declare this my last will and testament, hereby revoking all former wills and codicils by me at any time made.

After all my just debts and funeral expenses shall be paid, I direct my executor to pay the following legacies:

1. I give and bequeath to each of the children of my brother-in-law, Florian R. Hitz, three thousand dollars ($3000).

2. I give and bequeath to the Aid Association for the Blind in the City of Washington, District of Columbia, the sum of ten thousand dollars ($10,000).

3. I give and bequeath to Bertha, Frida and Conrad Graf, the three children of my deceased sister Christine Graf of Rebstein, Canton, St. Gallen, Switzerland, two thousand dollars ($2000) each.

4. I give and bequeath to the two children of my deceased brother John Mayer of Leuchingen, Canton, St. Gallen, Switzerland, two thousand dollars ($2000) each.

5. I give and bequeath to the children of my youngest
19 sister Anna Catherine Schachtler, widow of Jacob Schachtler, now residing at Upland, Franklin County, Nebraska, two thousand dollars ($2000) each.

6. I give and bequeath to my cousin Katie Edemann, now residing in Jersey City Heights, New Jersey, the sum of One Thousand Dollars ($1000).

7. I give and bequeath to the Eastern Dispensary and Casualty Hospital for the benefit of poor patients in its various wards, in the City of Washington, District of Columbia, the sum of Ten Thousand Dollars ($10,000).

8. I direct in case any legatee or legatees (being natural persons) herein named shall depart this life before my death, that the legacy or legacies shall not lapse thereby, but that the sum shall be paid to the personal representative of such deceased legatee for his or her next of kin.

9. I give and bequeath to the Swiss Association of Washington, D. C., called the "Gruetli Verein", the sum of Two Thousand Dollars ($2000).

10. I give and bequeath to the Swiss Benevolent Association of Washington, D. C., the sum of Two Thousand Dollars ($2000), to be by said Association invested to the best advantage, and I direct that the income therefrom shall be by it distributed each year among the poor Swiss.

11. I give and bequeath unto the Children's Hospital in the City of Washington, District of Columbia, the sum of Five Thousand Dollars ($5000).

12. I give and bequeath unto the National Homeopathic Hospital in the City of Washington, District of Columbia, for the
20 benefit of the poor patients in its various wards, the sum of Five Thousand Dollars.

13. I give and bequeath unto the Washington City Orphan Asylum, in the City of Washington, District of Columbia, the sum of Five Thousand Dollars ($5000).

14. I give and bequeath unto the German Orphan Asylum of the City of Washington, District of Columbia, the sum of Five Thousand Dollars ($5000).

15. I give and bequeath unto the Washington Hospital for Foundlings, in the City of Washington, District of Columbia, the sum of Five Thousand Dollars ($5000).

16. I give and bequeath unto the Garfield Memorial Hospital, in the City of Washington, District of Columbia, for the benefit of poor patients in its various wards, the sum of Five Thousand Dollars ($5000).

17. I give and bequeath unto the Home for Incurables, in the District of Columbia, the sum of Ten Thousand Dollars ($10,000).

18. I give and bequeath unto the Emergency Hospital in the City of Washington, District of Columbia, for the benefit of the poor patients in its various wards, the sum of Five Thousand Dollars ($5000).

19. I give and bequeath unto my friend, Mrs. Mary J. Stephens, now residing at No. 402 "A" Street, Southeast, this city, the sum of Five Thousand Dollars ($5000), if she shall survive me, otherwise this legacy shall lapse and fall into the rest and residue of my estate.

20. I give and bequeath unto the Ruppert Home for Aged People at Anacostia, D. C., the sum of Ten Thousand Dollars
21 ($10,000).

21. I give, devise and bequeath to my son, Theodore Albert Mayer, my residence No. 214 B Street, Southeast, and the adjoining lot and stable thereon, in square No. 761, in this city; I also give and bequeath to him all my horses, carriages, automobiles or other vehicles together with my furniture, jewelry, pictures, books, statu-

ary, piano, carpets, china and silverware, kitchen utensils, bedding, trunks, and valises, door and window hangings, wood and coal, music box, wines and liquors, all wearing apparel and clothing belonging to me and contained in No. 214 B Street, Southeast, or elsewhere belonging to me.

I also give and bequeath to him ten shares of the stock of the Central National Bank of Washington, D. C., and ten shares of the stock of the Union Trust Company of Washington, District of Columbia, and ten shares of the stock of the Norfolk and Washington Steamboat Company in the City of Washington, District of Columbia, and the sum of Fifteen Thousand Dollars ($15,000) in cash.

All the rest and residue of my estate, real, personal and mixed, which I now possess, or which may hereafter be acquired by me and wheresoever situate, I give, devise, and bequeath unto the American Security and Trust Company, a corporation existing and doing business in the District of Columbia under and by virtue of the authority of the laws in force therein, its successors and assigns.

In trust, however, for the following uses and purposes, and none other, to wit, to collect the income, rents, issues and profits thereof, and after payment therefrom of all taxes, insurance, expenses
22 for necessary repairs, and all other proper costs and expenses of managing the said estate and property, and apply the net income arising therefrom in the manner, to wit;

To pay over to my son, Theodore Albert Mayer, until he shall attain the age of thirty-three years, the sum of Three Hundred Dollars ($300) per month, retaining and accumulating all net income over and above said sum, until my son shall attain said age. Upon my son attaining the age of thirty-three years, I direct the payment of any portion of said income to my said son shall cease, and in lieu thereof I direct the Trustee hereunder, at that time to pay to him the sum of Fifteen Thousand Dollars ($15,000), and upon his attaining the age of thirty-six years I direct said Trustee to pay over to him the further sum of Fifteen Thousand Dollars ($15,000), and upon his attaining the age of thirty-nine years I direct said Trustee to pay over to him the further sum of Thirty Thousand Dollars ($30,000), and upon his attaining the age of forty-two years I direct said Trustee to pay over to him the further sum of Thirty Thousand Dollars ($30,000), and upon his attaining the age of forty-five years I direct the said Trustee to pay over to him the further sum of Thirty Thousand Dollars ($30,000), and upon his attaining the age of forty-eight years I direct the said Trustee to transfer, convey and pay over to him all of the trust fund and subject in its hands remaining, to be by him taken and held absolutely and in fee simple. I further direct that the receipt of my said son, either on account of income or payment of *of*
23 principal sums, shall be taken as a full *acquitance* and exoneration to said trustee on account of such payments.

In the event of the death of my said son before my death or before he shall attain the age of forty-eight years, leaving issue him surviving, I hereby direct my said Executor and Trustee, whom I hereby appoint the guardian and trustee of such child or children,

to apply from the net income of my estate a sum sufficient for his, her or their maintenance and education and support until such child or such children, if there be more than one, shall respectively attain the age of twenty-seven years, at which time I direct that the trust as to such child or children having attained the age of twenty-seven years, shall cease and determine and that the said trustee and guardian shall pay over, transfer and deliver to such child all of the trust estate in its hands remaining, or if more than one child, then to each its distributive share of said estate. Should such child, or if more than one child, all such children, die before attaining the age of twenty-seven years leaving no issue surviving, than and in such event, I direct that my estate shall be distributed in the manner provided in the event that my son shall die before attaining the age of forty-eight years leaving no child or children him surviving. Should such child or children of my son, or any of them, die before attaining the age of twenty-seven, leaving issue him, her, or them surviving, then and in such event I direct that such child or children shall take the share to which the parents would have been entitled. In the event, however, that my said son shall depart this life before me or before he shall attain the
24 age of forty-eight years, leaving no child or children him surviving, or descendants of such, then and in that event I direct my said executor and trustee to pay over from the balance of my estate then in its hands remaining the following legacies, to wit:

Fifteen Thousand Dollars ($15,000) to my brothers and sisters and their descendants, and to the descendants of such as are now dead and to their heirs respectively, their descendants taking and sharing equally between them the portion of said sum which would have gone to their respective parents living, under the provisions of this will.

And in addition to the bequests hereinbefore made, I, in the event above, give and bequeath unto the Children's Hospital of Washington, D. C., the sum of Twenty Thousand Dollars ($20,000); to the National Homeopathic Hospital of Washington, D. C., the sum of Ten Thousand Dollars ($10,000); to the Washington City Orphan Asylum the sum of Twenty Thousand Dollars ($20,000); to the George Washington Hospital of the City of Washington, District of Columbia, the sum of Ten Thousand Dollars ($10,000); to the Garfield Memorial Hospital of the City of Washington, District of Columbia, the sum of Ten Thousand Dollars ($10,000); to the German Orphan Asylum of the City of Washington District of Columbia, the sum of Ten Thousand Dollars ($10,000); to the Washington Home for Incurables of the City of Washington, District of Columbia, the sum of Thirty Thousand Dollars ($30,000) to the Washington Home for Foundlings in the City of Washington, District of Columbia, the sum of Twenty Thousand Dollars ($20,000); to the Aid Association for the Blind, now located
25 on E Street, Northwest, between Ninth and Tenth Streets, Washington, D. C., the sum of Twenty Thousand Dollars

($20,000.00); to the Emergency Hospital in the City of Washington, District of Columbia, *to* the sum of Ten Thousand Dollars ($10,000); to the Eastern Dispensary and Casualty Hospital in the City of Washington, District of Columbia, for the benefit of the poor patients in the several wards, the sum of Ten Thousand Dollars ($10,000) and to the Ruppert Home for Aged People in Anacostia, D. C., the sum of Twenty Thousand Dollars ($20,000).

Whatever may remain after the payment of said legacies I direct my executor and trustee to pay over to the Trustees for the Home for Incurables, the Aid Association for the Blind, the George Washington Hospital, the Eastern Dispensary and Casualty Hospital, the National Homeopathic Hospital, the Garfield Memorial Hospital, the Children's Hospital, and the Ruppert Home for Aged People, all in the City of Washington, District of Columbia, in equal shares.

I hereby authorize and empower my executor and trustee to continue any investment made by me and to invest any money of my estate in real estate in the District of Columbia, or in bonds or notes secured by first mortgage or deed of trust on real estate in said District, or in bonds of said District or of the United States, or in stocks or bonds of any incorporated railroad company which may have a continuous market value at par or upwards, and shall have paid interest or dividends promptly without defaulting or delaying for a period of five years or more immediately preceding such investment.

26 I also hereby authorize and empower my said executor and trustee to sell, transfer, and convey any or all of my estate personal or real, and wheresoever situate for the purpose of paying debts and legacies, or in their discretion for a better investment or for a change of investment, or for the more effectual carrying out of any of the provisions and directions of this my will, and I hereby exonerate any purchaser or purchasers from any obligation to see to the application of the purchase money.

I hold the following policies of insurance in the Equitable Life Assurance Society of New York, one dated August 28, 1895, #751,-808, for $2000., and one dated August 28, 1895, #751,763 for $3000., and one dated August 28, 1895, #753,334 for $2000 upon the life of William H. Glading, and payable at his death; also a policy #124,703 in the New England Life Insurance Company, being what is known as a twenty year policy, for $10,000. upon the life of Elmer Gates. In order that these policies may not lapse for want of payment of premiums, I direct my executor and trustee to pay the necessary premiums to keep them in force, out of the income from my estate.

I hereby direct my executor to have my body embalmed and cremated, and the ashes deposited with the remains of my wife in the Congressional Cemetery in Washington, D. C.

I hereby nominate, constitute, and appoint the aforenamed American Security and Trust Company,the executor and trustee under this my last will and testament.

In witness whereof, I have hereunto set my hand and affixed my seal, this Fifteenth day of February A. D. 1907.

27 THEODORE J. MAYER. [SEAL.]

Signed, sealed, published and declared by Theodore J. Mayer, the above named testator, at Washington, D. C. on the day and date above mentioned, as and for his last will and testament in the presence of us, who, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

WARD THORON,
1741 *K Street N. W., Washington, D. C.*
WM. A. McKENNY,
Pa. Ave. & 15th St. N. W., City.

EXHIBIT "B."

This indenture made this 5th day of February 1907—

Witnesseth that Theodore J. Mayer, widower, party of the first part, for and in consideration of Ten (10) Dollars, in current money of the United States, and divers other valuable considerations, to him in hand paid by The Washington Loan and Trust Company, a corporation existing under the Laws of the United States relating to the District of Columbia, and doing business therein, party hereto of the second part, receipt of which, at the delivery hereof, is hereby acknowledged, does grant and convey unto and to the use of the said The Washington Loan and Trust Company, a corporation as aforesaid, its successors and assigns, the following described land and premises, and improvements thereon, with the easements and

28 appurtenances thereunto belonging, and situate and lying in Montgomery County, State of Maryland, and being known and described as all of Block numbered Twenty-seven (27) in Section numbered Two (2) of a Subdivision made by The Chevy Chase Land Company of Montgomery County, Maryland, being as per plat recorded in Liber J. A. No. 36 at folio 61, of the Land Records of Montgomery County, Maryland. Also all the personal property, machinery and other paraphernalia now used in the buildings erected thereon, or upon the ground itself, and now in the possession of Elmer Gates, the tenant upon said property.

To have and to hold the said land and premises, together with the improvements thereon and all the personal property, as aforesaid, with the easements and appurtenances, unto and to the use of the said The Washington Loan and Trust Company, party of the second part, its successors and assigns.

In testimony whereof I have hereunto set my hand and seal on the day and year first hereinbefore written.

(Signed) THEODORE J. MAYER. [SEAL.]

Signed, sealed and delivered in the presence of—

(Signed) EDWIN C. BRANDENBURG.
" LLOYD A. DOUGLASS.

DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on this 5th day of February, 1907, before the subscriber a Notary Public in and for the District of Columbia, personally appeared Theodore J. Mayer, widower, the grantor
29 named in the foregoing and annexed deed to The Washington Loan and Trust Company, a corporation existing under the laws of the United States relating to the District of Columbia, and did acknowledge said deed to be his act and deed.

In testimony whereof I have hereunto subscribed my name and affixed my official seal this 5th day of February 1907.

(Signed) LLOYD A. DOUGLASS,
[SEAL.] *Notary Public, D. C.*

(Copy.)
G.

(Endorsed:) 42. Deed. Paid. Clerk's Office. Theodore J. Mayer, Mont. Co. Md. The Washington Loan and Trust Company, a corporation. Received this 18th day of Feb'y 1907, 12:18 P. M., to be recorded and same day was recorded in Liber No. 192, folio 301, one of the Land Records of Montgomery County, Md., and examined per John L. Brunett, Recorder.

30 *Separate Answer of the American Security and Trust Company.*

Filed November 27, 1908.

In the Supreme Court of the District of Columbia.

No. 28,094. In Equity.

THEODORE ALBERT MAYER
vs.
AMERICAN SECURITY AND TRUST COMPANY ET AL.

For answer unto said Bill of Complaint, or unto so much thereof as it is advised it is material and proper for it to make answer unto, it states and avers as follows:

I AND II.

It admits the truth of the statements of these two paragraphs in respect of the residence of the complainant, the corporate domicile of the several defendants, and the capacity in which the complainant sues and the defendants are sued.

III.

It admits that said Theodore *A.* Mayer died March 12th, 1907, possessed of a large amount of real and personal property, other than said Chevy Chase property mentioned in said Bill, leaving his son,

said complainant, surviving him, his sole heir-at-law, and leaving a last will and testament dated February 15, 1907, which has been duly admitted to probate and record; and that this defendant is named as trustee and executor therein and has accepted said
31 trusteeship and duly qualified as executor thereof and that letters testamentary have been issued to it.

It admits that as executor and trustee under said will it has possessed itself of the real and personal property which was of said testator, other than said Chevy Chase property and said patent rights.

IV.

It presumes that the provisions of said will, as set forth in this paragraph of the Bill, are correctly stated, but for greater certainty prefers that reference should be had to the will itself.

V.

It admits that the real and personal property of said decedent which came into possession of this defendant is more than sufficient to satisfy and pay in full the several legacies directed to be paid by the testator and all the just debts and funeral expenses of said testator and the expenses of administration.

VI.

It admits that said Theodore J. Mayer, by deed dated February 5, 1907, conveyed said Chevy Chase property described in this paragraph of the Bill, to said defendant, The Washington Loan and Trust Company, absolutely in fee simple, and that said Exhibit B is a true copy of said deed.

VII.

It admits the execution of the declaration of trust by said Washington Loan and Trust Company set forth in this paragraph
32 of the Bill, but for greater certainty prefers that the original be produced.

VIII.

It admits the averments in this paragraph of the Bill in respect of the assignment of said patent rights to said Washington Loan and Trust Company upon the same trusts as said Chevy Chase real estate.

IX.

It admits, on information and belief, that said Washington Loan and Trust Company determined and fixed October 15, 1908 as the reasonable time by which the defendant The George Washington University should comply with the conditions of said trust agreement, so notified said University, and that in default thereof it would reconvey said property to the person or persons lawfully entitled thereto.

X.

It is advised that it is not required to answer the averments of this paragraph in respect of said University, but admits that the time for said University to comply with the terms of said declaration of trust has elapsed and that it is the duty of said Washington Loan and Trust Company to convey said property in accordance with the trusts upon which it held the same.

XI.

It admits that complainant is the son and sole heir-at-law of said testator.

As it had been advised by counsel that the property in-
33 cluded in said declaration of trust and held thereunder by said Washington Loan and Trust Company, upon default made by said University in acquiring the same, passed to this defendant under the residuary clause in said will, it so notified said Washington Loan and Trust Company, and it now, on the advice of its counsel, claims, as it deems it is its duty to do, that the same did so pass to this defendant, and that said Washington Loan and Trust Company should be decreed to convey, assign and deliver said property to it, as trustee under said will.

XII.

It is advised that it is not required to answer the averments of this paragraph of the Bill, alleging as it does immaterial and irrelevant matters of fact and matters of law.

XIII.

Upon information and belief, it admits that under said declaration of trust said University no longer has any interest in said property.

XIV.

Upon information and belief, it admits the averments of this paragraph of the Bill in respect of the said option to said Gates, the extension thereof and that said option has expired.

XV.

As the averments of this paragraph of the Bill relate to the matter of the appointment of a receiver of said property, it sub-
34 mits the same to such action of the Court as it may deem lawful and proper.

XVI.

It is advised that as the averments of this paragraph relate solely to matters of law it is not required to answer the same.

XVII.

It is advised by counsel, and therefore avers, that the several legatees named in the residuary clause of said will are necessary and

essential parties; and that unless they are made parties the Court is without jurisdiction to pass any decree in the premises, except to dismiss said Bill.

And having answered said Bill fully it prays that it may have the same advantage as if it had demurred thereto.

[SEAL.] AMERICAN SECURITY & TRUST CO.,
By CHARLES J. BELL, *President.*

Attest:
JAMES F. HOOD,
Secretary.
WM. F. MATTINGLY,
Sol'r for Defendant.

DISTRICT OF COLUMBIA, *To wit:*

I, Charles J. Bell, do solemnly swear that I am the President of The American Security and Trust Company, a body corporate and one of the defendants in the above entitled cause; that the
35 foregoing answer was subscribed by me in the name of said corporation; that I have read the foregoing answer and know the contents thereof; that the facts therein stated as of personal knowledge are true, and those stated upon information and belief I believe to be true.

CHARLES J. BELL,

Subscribed and sworn to before me this 24th day of Nov., A. D. 1908.

[SEAL.] HARRY W. FINNEY,
Notary Public, D. C.

Separate Answer of the Washington Loan and Trust Company.

Filed December 16, 1908.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 28094.

THEODORE ALBERT MAYER, Complainant,
vs.
THE AMERICAN SECURITY & TRUST COMPANY, Executor and Trustee under the Last Will and Testament of Theodore J. Mayer, Deceased, *et al.,* Defendants.

For answer to so much and such parts of the bill of complaint in this cause filed, as this defendant deems it necessary and
36 proper for it to answer unto, it answering says:

1, 2. It admits the allegations contained in the first and second paragraphs of the bill of complaint.

3. Having no personal knowledge of the matters and things set forth in the third paragraph of the bill of complaint this defendant can neither admit nor deny the same.

4. This defendant admits the truthfulness of the allegations contained in the fourth paragraph of the bill of complaint and says that the quotations from the last will and testament of Theodore J. Mayer, deceased, set forth in said paragraph are correctly taken from said last will and testament.

5. This defendant has no knowledge that will enable it either to admit or deny the allegations contained in the fifth paragraph of the bill of complaint, but presumes that the same are correctly stated therein.

6. This defendant admits the allegations of the sixth paragraph of the bill of complaint, to wit, that the property at Chevy Chase, Maryland, belonging to the said Theodore J. Mayer, deceased, was, prior to the execution of his last will and testament, to wit, the 5th day of February 1907, conveyed by a deed in fee simple to this defendant.

7. This defendant admits the allegations contained in the seventh paragraph of the bill of complaint.

8. For answer to the eighth paragraph of the bill of complaint this defendant says, that at or about the time the deed to the Chevy Chase property was executed and delivered to it by the said Theodore J. Mayer, the said Mayer transferred, assigned, set over and
37 delivered to this defendant to be held by it upon the same trusts and conditions, as set forth in the trust agreement of February 5th, 1907, concerning the Chevy Chase property, and more particularly set forth in the seventh paragraph of the bill, certain patent rights said to have been owned by the said Theodore J. Mayer, which said assignment was duly recorded in the United States Patent Office at the City of Washington, D. C.; and this defendant files herewith and prays that the same may be taken and read as a part hereof a full and complete copy of said assignment containing a list of the patents covered thereby, which is marked, "Exhibit 'A'," to the answer of the defendant, The Washington Loan & Trust Company, Trustee; and this defendant says that said assignment is still held by it in accordance with the terms and conditions of the declaration of trust hereinbefore referred to.

9. This defendant admits the allegations contained in the ninth paragraph of the bill of complaint.

10. For answer to the tenth paragraph of the bill this defendant says that according to the terms of the declaration of trust hereinbefore referred to, the time within which The George Washington University was to acquire by purchase the, "Dean or Oak Lawn," property, was left to the discretion of this defendant, the intention of the grantor, the said Theodore J. Mayer, being, as this defendant interpreted the same, that it should use its discretion in allowing the defendant, The George Washington University, a reasonable length of time within which to dispose of the so-called Van Ness property, and to purchase the "Dean or Oak Lawn" property, and in accord-

ance with the exercise of this discretion this defendant, con-
38 sidering that a reasonable time had elapsed, called upon the said defendant, The George Washington University, in writing, by letters dated the 13th day of February 1908, the 22nd day of May 1908, and the 10th day of August 1908, copies of which letters are hereto attached and made part hereof, marked, "Exhibits 'B,' 'C' and 'D'," of this defendant's answer to the bill of complaint in this cause filed, to fix a time certain within which it would either comply with the conditions of the declaration of trust aforesaid, in respect to the said Chevy Chase property and the patents aforesaid, or abandon the same that this defendant might convey the property, as required by the terms of said declaration of trust, to the heirs and assigns of the said Theodore J. Mayer, now deceased. In said letter of the 10th day of August 1908, this defendant fixed the date within which the University must act as the 15th day of October 1908, and the said University in response to said last mentioned communication, through its President, Charles W. Needham, under date of August 12th, 1908, a copy of which is filed herewith marked "Defendant's Exhibit 'E'," advised this defendant that the time fixed seemed reasonable. Subsequently, to wit, on or about the 15th day of October 1908, this defendant received from Charles W. Needham, President of The George Washington University, a communication of that date in which it was definitely stated that the University had abandoned the idea of acquiring the "Dean or Oak Lawn" property for the reason that the owners of said property refused to sell the same, thus making the performance of the condition prescribed by the said Theodore
39 J. Mayer, in the declaration of trust, impossible so far as the said University was concerned, a copy of which said letter is filed herewith marked, "Defendant's Exhibit 'F'," and prayed to be taken and read as a part hereof. Thereupon this defendant advised The American Security & Trust Company, and the complainant, through their respective attorneys, of the conclusion of the University and that this defendant was ready and willing at any time to comply with the requirements of said declaration of trust by conveying the property aforesaid, to wit, the Chevy Chase property, the contents of the buildings thereon, and the said patent rights, to the heirs and assigns of the said Theodore J. Mayer, deceased.

11. For answer to the eleventh paragraph of the bill of complaint this defendant says that it is true as therein alleged that the complainant, the sole heir and son of the said Theodore J. Mayer, deceased, has made a demand upon it to convey the property aforesaid to him; it admits further that it is true that while expressing its desire to perform its duties in the premises, it has refused to make such conveyance until the full right of the complainant to have such conveyance made to him is judicially determined. This defendant avers that The American Security & Trust Company, Executor and Trustee under the last will and testament of Theodore J. Mayer, deceased, has also made demand upon it for a conveyance of said property, and this defendant has advised The American Security & Trust Company, Executor and Trustee, as aforesaid, that it is ready

and willing to make a conveyance of the property to such grantee as may be judicially determined by the Court. This de-
40 fendant has been compelled to take this position by reason of the conflicting claims of the complainant and the said The American Security & Trust Company.

12. For answer to the twelfth paragraph of the bill of complaint this defendant says, that the matters and things set forth in said paragraph, except the allegation that the default in the performance of the condition authorizing and requiring a reconveyance of the said property did not occur until subsequent to the death of the said Theodore J. Mayer, are conclusions of law which this defendant is advised and believes it is not necessary for it to answer, other than to say that it is now and has been at all times since the abandonment of the said property by the said defendant, The George Washington University, ready and willing to convey the same to either the complainant, or the defendant, The American Security & Trust Company, Executor and Trustee as aforesaid, as soon as it may be judicially determined to which of the two parties the said property should be conveyed.

Further answering said paragraph twelve this defendant says that it entertained the belief that as said Mayer in said Declaration of Trust provided that in the event The George Washington University should not be able to comply with the conditions of the trust that the said property should be conveyed to his, "heirs or assigns," which this defendant originally construed to mean his son, the complainant herein, and this view was expressed in a letter addressed to this defendant by the President of said University under date of July 23d 1907, a copy of which is filed herewith marked, "De-
41 fendant's Exhibit 'H'."

13. This defendant admits the allegations contained in the thirteenth paragraph of the bill of complaint.

14, 15. For answer to the fourteenth and fifteenth paragraphs of the bill of complaint this defendant says that it admits that at the time of the transfer of the property aforesaid, to it, by the said Theodore J. Mayer, it was subject to an option given by the said Mayer in his lifetime, in writing, to one Elmer Gates, and that since the death of the said testator and with the consent of all parties in interest this option has been extended from time to time by this defendant to the 15th day of June 1908, for which extension the said Gates paid to this defendant the sum of Twenty-five Hundred (2500) Dollars as rental for said property between January 9th, 1908 and the 15th day of June 1908, with the agreement that upon the payment of an additional sum of Twenty-five Hundred (2500) Dollars on or before the 15th day of June 1908 the said option would be extended until the 15th day of December 1908. This defendant says that such additional sum has not been paid by the said Gates, and that steps have been taken by it to move said Gates from said property and regain possession thereof, by proper proceedings instituted in the Courts of Montgomery County, State of Maryland, in which County and State the property is located; and this defendant expects that within a very short time it will be in either

absolute possession of said property, or a further money consideration will be received by and with the consent of all parties in interest for the further extension of said agreement, but such extension will not be made by this defendant unless it be by and with the consent of all parties in interest, as aforesaid.

42

This defendant admits that it has received, since the property aforesaid came into its possession, the sum of $7023.93, and that it has expended for legitimate purposes in the care and preservation of said property, as well as for insurance, taxes, etc., a sum aggregating $4306.59, and that at the time of the filing of this answer it has in its possession to the credit of said trust fund the sum of $2717.34, subject to such further fees and allowances as this defendant may hereafter be entitled to receive; and this defendant files herewith an itemized statement of its account, marked "Exhibit 'G'," and prays that the same be taken and read as a part of its answer to the bill of complaint in this cause filed, in order that the same may be before the Court at the hearing of this cause, and it stands ready and willing to comply with such order as may be passed herein by the Court in respect to the disposition of the property, real and personal, in its possession and held under the declaration of trust aforesaid.

16. For answer to the sixteenth paragraph of the bill of complaint this defendant says that said allegation being an allegation of a legal conclusion it can neither admit nor deny the same.

Having fully answered this defendant prays to be hence dismissed with its reasonable costs.

THE WASHINGTON LOAN & TRUST CO., *Trustee,*
By JNO. JOY EDSON, *President.*

JOHN B. LARNER,
Att'y for Def'd't.

43

John Joy Edson being first duly sworn deposes and says that he is the President of The Washington Loan & Trust Company; that he has read the foregoing answer by him subscribed and knows the contents thereof; that the facts therein stated upon his personal knowledge are true and as to those stated upon information and belief he believes them to be true.

JNO. JOY EDSON.

Subscribed and sworn to before me this 16th day of December, 1908.

[SEAL.] ALFRED B. DENT,
Notary Public.

DEFENDANT'S EXHIBIT "A."

Whereas I, Theodore J. Mayer, of the City of Washington, District of Columbia, hold by assignment from Elmer Gates, the following letters patent and applications for letters patent:

1. Apparatus for producing or developing Ozone, application

made Jan. 31, 1899, Serial No. 704,038; one undivided half interest; abandoned.

2. Storage Batteries; charging and discharging; application made Jan. 31, 1899, Serial No. 704,067; one undivided half interest; abandoned.

3. Electrical Soldering Irons, application made Nov. 30, 1898, Serial No. 697,931; exclusive right, title and interest; abandoned.

44 4. Storage batteries, charging and discharging; filed Jan. 31, 1899; Serial No. 704,067; one undivided half interest; abandoned; see No. 2.

5. Process for making Radiographs and apparatus therefor, Patent No. 653,383, July 10, 1900; exclusive right, title and interest.

6. Apparatus for producing or developing Ozone, applica— made Jan. 31, 1899, Serial No. 704,038; one undivided half interest; abandoned; see No. 1.

7. Process of simultaneously cooling air and purifying and regulating its moisture, and apparatus therefor; Patent No. 636,255, dated Nov. 7, 1899; exclusive right, title and interest.

8. Apparatus for simultaneously purifying, cooling and regulating moisture of air, Patent No. 636,256, dated Nov. 7, 1899; exclusive right, title and interest.

9. Production of Alloys, Patent No. 729,752, dated June 2, 1903; exclusive right, title and interest.

10. Mechanically operated musical instruments, filed Dec. 19, 1898, Serial No. 699,676, exclusive right, title and interest, not our case no record.

11. Means for varying tone quality, filed Dec. 10, 1898, Serial No. 698,897; not our case no record.

12. Producing tones electrically, filed Dec. 19, 1898, Se-
45 rial No. 699,675, abandoned; exclusive, right, title and interest.

13. Apparatus for electric generation, filed June 23, 1899, Serial No. 721,599, exclusive right, title and interest, not our case, no record.

14. Apparatus for generating Ozone, filed Sept. 23, 1898, Serial No. 691,693, entire right, title and interest; abandoned.

15. Shirts, filed Aug. 19, 1898, Serial No. 688,998, entire right, title and interest, abandoned.

16. Telescope, filed Nov. 31, 1897, Serial No. 657,710, entire right, title and interest, abandoned.

17. Optical apparatus, filed June 21, 1898, Serial No. 684,047, entire right, title and interest; abandoned.

18. Mega-Microscope, filed Aug. 19, 1898, Serial No. 688,996, entire right, title and interest; abandoned.

19. Trowsers, filed Aug. 19, 1898, Serial No. 688,997, entire right, title and interest, abandoned.

20. Process of making Radiographs and apparatus, filed Sept. 26, 1898, Serial No. 691,909; Patent No. 653,383, entire right, title and interest; See No. 5.

21. Electric soldering iron, filed Nov. 30, 1898, Serial No.
46 697,931, entire right, title and interest, abandoned; See No. 3.

22. Apparatus for producing Ozone, filed Jan. 21, 1899, Serial No. 704,038; entire right, title and interest, abandoned, See No. 1.

23. Storage batteries, filed Jan. 31, 1899, Serial No. 704,067, entire right, title and interest; abandoned, See No. 2.

24. Apparatus for cooling and purifying air, filed June 19, 1899, Serial No. 721,174, entire right, title and interest; abandoned.

25. Pneumatic Suction Sweeper, about to make application; Specification executed Dec. 7, 1899; entire, right, title and interest; not our case; no record.

26. Electrically operated sheeding mechanism for looms, Patent No. 565,446, dated Aug. 11, 1896; entire right, title and interest.

27. Electrically operated Jacquard mechanism for looms, Patent No. 565,447, dated Aug. 11, 1896; entire right, title and interest.

28. Electrically operated reed for looms, Patent No. 565,448, dated Aug. 11, 1896, entire right, title and interest.

29. Magnetic shuttle motion for looms, Patent No. 565,449,
47 dated August 11, 1896, entire right, title and interest.

30. Electro-static separation, Patent No. 653,343; dated July 10, 1900, Serial No. 739,006, entire right, title and interest.

31¼. Dia-Magnetic separation, Patent No. 653,344 dated July 10, 1900, Serial No. 739,007, entire right, title and interest.

32. Diamagnetic separation, Patent No. 653,345, July 10, 1900, Serial No. 739,008, entire right, title and interest.

33. Magnetic separation, Patent No. 653,346, dated July 10, 1900, Serial No. 739,009, entire right, title and interest.

34. Diamagnetic separation, Patent No. 653,342, dated July 10, 1900, Serial No. 731,762, entire right, title and interest.

35. Recovering rubber from Milk Weed and like plants, filed Jan. 4, 1900, (Serial No. 401, allowed March 20, 1900), entire right, title and interest; forfeit.

36. Diamagnetic separator, Patent No. 731,038, dated June 16, 1903, Serial No. 6,944, entire, right, title and interest.

37. Diamagnetic separators Patent No. 731,035, dated June
48 16, 1903, Serial No. 6,945, entire right, title and interest.

38. Diamagnetic separators Patent No. 731,039, dated June 16, 1903, Serial No. 6,946, entire right, title and interest.

39. Diamagnetic separators filed March 1, 1900, Serial No. 6,947, entire right, title and interest; abandoned.

40. Diamagnetic separators, Patent No. 731,036, dated June 16, 1903, Serial No. 6,948, entire right, title and interest.

41. Diamagnetic separators, Patent No. 731,040, dated June 16, 1903, Serial No. 9,265, and renewal No. 138,122, entire, right, title and interest.

42. Diamagnetic separators, Patent No. 731,041, dated June 16, 1903, Serial No. 9,266, entire right, title and interest.

43. Diamagnetic separators, Patent No. 731,042, dated June 16, 1903, Serial No. 9,267, entire right, title and interest.

44. Diamagnetic separation, Patent No. 731,044, June 16, 1903, Serial No. 12,901, entire right, title and interest.

45. Diamagnetic separation, Patent No. 731,045, dated June 16, 1903, Serial No. 12,902, entire right, title and interest.

49 46. Separating Gold from magnetic sands, filed March 19, 1900, Serial No. 9,268, entire right, title and interest.

47. Separating Gold from Magnetic sands, Patent No. 662,409, dated Nov. 27, 1900, Serial No. 9,269, entire right, title and interest.

48. Separating Gold from Alluvial Deposits, Sea Sand etc., filed March 21, 1900, Serial No. 9,521, entire right title and interest, pending last action, June 24, 1904.

49. Separating Diamagnetic material from sand etc., Patent No. 731,043, June 16, 1903, Serial No. 12,899, entire right, title and interest.

50. Application for excavating and separating, filed April 14, 1900, Serial No. 12,900, entire right, title and interest, not our case, no record.

51. Magnetic separation, Patent No. 662,410, dated Nov. 27, 1900, Serial No. 12,903, entire right, title and interest.

52. Magnetic separation, Patent No. 622,411, dated Nov. 27, 1900, Serial No. 12,904, entire right, title and interest.

53. Magnetic separator, Patent No. 662,412, dated Nov. 27, 1900, Serial No. 12,905, entire right, title and interest.

50 54. Magnetic separator, Patent No. 662,413, dated Nov. 27, 1900, Serial No. 12,903, entire right, title and interest.

55. Smelting magnetic iron ore and the like, filed July 12, 1900, Serial No. 23,366, entire right, title and interest, abandoned.

56. Magnetic separator, Patent No. 662,414, dated Nov. 27, 1900, Serial No. 23,370, entire right, title and interest.

57. Alloys, filed June 26, 1899, Serial No. 721,897, one undivided third; forfeited, four applications filed in lieu thereof, see items Nos. 9, 67, 68 and 69.

58. Magnetic separation, Patent No. 662,410, dated Nov. 27, 1900, Serial No. 12,903, grants license, see No. 51.

59. Magnetic separation, Patent No. 662,411, dated Nov. 27, 1900, Serial No. 12,904, grants license, see No. 52.

60. Magnetic separator, Patent No. 662,412, dated Nov. 27, 1900, Serial No. 12,905, grants license, see No. 53.

61. Magnetic separator, Patent No. 662,413, dated Nov. 27, 1900, Serial No. 12,906, grants license, see No. 54.

62. Magnetic separator, Patent No. 662,414, dated Nov.
51 27, 1900, Serial No. 23,370, grants license, see No. 56.

63. Smelting magnetic iron ore, filed July 12, 1900, Serial No. 23,366, one undivided third, abandoned.

64. Separating gold from Magnetic Sands, Patent No. 662,409, Nov. 27, 1900, Serial No. 9,269, entire right, title and interest.

65. Sub-Aqueous magnetic separator, Patent No. 729,753, dated June 2, 1903, Serial No. 42,795, renewal No. 130,153, entire right, title and interest.

66. Method of Agglomerating Magnetic Ores, Patent No. 780,716,

Jan. 24, 1905, Serial No. 43,202, renewal No. 130,154, entire right, title and interest.

67. Alloy casting, Patent No. 729,756, dated June 6, 1903, application executed Jan. 9, 1903, entire right, title and interest.

68. Method of casting alloys, Patent No. 729,754, June 2, 1903, application executed Jan. 9, 1903, entire right title and interest.

69. Apparatus for casting alloys, application executed Jan. 9, 1903, Patent No. 729,755, dated June 2, 1903, entire right, title and interest.

70. Method of extracting rubber from Milkweed, application executed Jan. 9, 1903, Serial No. 138,819, entire right, title and interest, pending last action March 24, 1904.

52 71. Cooling apparatus for explosive engines, application executed Dec. 17, 1902, Serial No. 138,818, entire right, title and interest, pending last action June 10, 1905.

72. Diamagnetic separator, application executed Jan. 1903, Patent No. 731,037, June 16, 1903, entire, right title and interest.

Foreign Patents of Elmer Gates Assigned to Theodore J. Mayer.

England.

1. No. 17781, Aug. 11, 1896, Shedding Mechanism for Looms, entire right, title and interest.

2. No. 17782, Aug. 11, 1896, Shedding Mechanism for Looms, entire right, title and interest.

3. No. 17783, Aug. 11, 1896, Beating up Mechanism for Looms, entire right, title and interest.

4. No. 17784, Aug. 11, 1896, Shuttle operating device for looms, entire right, title and interest.

5. No. 12,599, Sept. 29, 1900, separation of mixed granular or pulverized substance, entire right, title and interest.

6. No. 12,600 same as No. 5.

53 7. No. 12,601 same as No. 5.

Canadian.

1. No. 68,576, Aug. 30, 1900, Serial No. 91,010, July 10, 1900, diamagnetic separation, entire, right title and interest.

2. No. 68,576, Aug. 30, 1900, Serial No. 91011, July 10, 1900, Electro-Static and Combined Electro-Static and Biamagnetic systems, entire right, title and interest.

3. No. 69,036, Oct. 17, 1900, Serial No. 91012, July 10, 1900, separating particles of conducting material from mixtures containing them, entire right, title and interest.

4. Patents Nos. 54,240; 54,241; 54,242; and 54,243, Dec. 2, 1896, looms, entire right, title and interest.

New Zealand.

1. Patent Nos. 12,897; 12,898 and 12,899, Aug. 2, 1900, separation of mixed granular and pulverized substances, entire right, title and interest.

And whereas, The Washington Loan & Trust Company a corporation duly organized, desires to acquire the sole and entire interest in and to said letters patent and application for letters patent,

Now, therefore, These presents do witness that I, Theodore
54 J. Mayer, in consideration of One ($1.00) Dollar to me paid by the said Washington Loan & Trust Company, the receipt whereof is hereby acknowledged, do hereby assign, transfer and set over and deliver unto the said Washington Loan & Trust Company, the sole, entire and undivided right, title and interest in and to all of said letters patent and application for said letters patent, to have and to hold during and for the terms for which said letters patent are or may be granted, and for and during the terms for which the letters patent may be granted upon said applications, in trust, nevertheless, for the following purposes: and

I, the said Theodore J. Mayer, do covenant and agree that upon request I will make, execute and deliver to the said Washington Loan & Trust Company, all further assignments or other instruments that the said Washington Loan & Trust Company may be advised by counsel are necessary or proper to invest in the said Washington Loan & Trust Company, the legal title in and to said letters patent and the inventions described therein.

In witness whereof, I, the said Theodore J. Mayer, do set my hand and seal this 19th day of February A. D. 1907.

(Signed) THEODORE J. MAYER. [SEAL.]

Witness:

(Signed) EDWIN C. BRANDENBURG.
EUGENE BLAIR.

55 DEFENDANT'S EXHIBIT 'B.'

FEBRUARY 13, 1908.

Dr. Charles W. Needham, President, The George Washington University.

MY DEAR DR. NEEDHAM: We have received a communication from Messrs. Brandenburg and Brandenburg, Attorneys at Law, for Mr. T. A. Mayer, asking and insisting upon this Company, as Trustee, fixing upon a date that is considered a reasonable time to terminate the trust made by his father for the benefit of the University.

The matter was brought before our Trust Committee, today, and I was instructed to request the University to consider the matter and inform this Company, as Trustee, what they decide would be a reasonable time, to enable us to advise Messrs. Brandenburg and Brandenburg.

Yours very respectfully,

(Signed) JOHN JOY EDSON, *President.*

56 DEFENDANT'S EXHIBIT 'C.'

MAY 22, 1908.

Dr. Charles W. Needham, President, George Washington University, Washington, D. C.

DEAR SIR: This Company, as Trustee for certain property in Chevy Chase, under a deed in trust from the late Theodore J. Mayer, has been notified by Mr. Theodore A. Mayer, to request that the George Washington University determine definitely, at the meeting of their Board, on June 3rd, next, their purpose in reference to this property.

Mr. Mayer states that he feels entitled to a definite statement at that time, in order that his future actions may be governed accordingly.

Yours very respectfully,
(Signed) FRED'K. EICHELBERGER,
Trust Officer.

57 DEFENDANT'S EXHIBIT 'D.'

WASHINGTON, D. C., *August* 10, 1908.

Dr. Charles W. Needham, Cazenovia, New York.

DEAR DR. NEEDHAM: On the 15th of this month, at the meeting of our Board of Directors, I recommend for their approval, which is required, the fixing of October 15, 1908, as the date when, if the George Washington University failed to purchase the Dean property, this Company, as Trustee, should deed the Chevy Chase property to the Executor, or Heir of the Estate of Theodore J. Mayer, deceased, in accordance with the terms of the deed in trust, dated February 5, 1907.

The point was raised in the Board, although I stated that it was in harmony with your views as expressed to me verbally, that you should acquiesce, in writing, in fixing this date on behalf of the University.

I wrote to Mr. Mayer, through Mr. Brandenburg, informing him of the fixing of the date, and expressing the hope that it would be satisfactory. Since then, Mr. Mayer has called, and expressed no objection to this course being pursued.

Kindly write me, giving your assent to this date, officially, in time to allow me to bring it before the Board, for its approval.

Very sincerely yours,
(Signed) JOHN JOY EDSON, *President.*

58 DEFENDANT'S EXHIBIT 'E.'

CAZENOVIA, NEW YORK, *Aug.* 12, 1908.

DEAR MR. EDSON: Your letter of the 10th is received. My answer to your former letter was written the same day, 10th inst., and has no doubt been received. Your action fixing October 15th "as the date when, if The George Washington University failed to purchase

the Dean property," your Company, "should deed the Chevy Chase property to the Executor or heir of the estate of Theodore J. Mayer, deceased," &c., &c., seems to me reasonable as in accordance with the views expressed when we met in Washington.

I shall continue to hope that this desirable site may be acquired by the University and that Mr. Mayer's earnest wish expressed to me a few days before his death, that a suitable memorial building be erected thereon to be named after his wife, may be realized.

Very truly yours,

(Signed) CHAS. W. NEEDHAM.

Hon. John Joy Edson, President, &c., &c., &c.

59 DEFENDANT'S EXHIBIT 'F.'

WASHINGTON, D. C., *October* 15, 1908.

Washington Loan & Trust Company, Mr. John Joy Edson, President.

DEAR SIR: In the matter of the Chevy Chase property conveyed in trust to The Washington Loan & Trust Company by the late Theodore J. Mayer, to be turned over to the University upon condition that it acquire the Dean site, I am instructed by the Board of Trustees of the University to inform you that the owners of the Dean property refuse to sell the property to the University, for the reason that they do not wish to dispose of it. For this reason it is impossible for the University to perform the condition named in the trust above referred to.

Very truly yours,

(Signed) CHAS. W. NEEDHAM.

60 DEFENDANT'S EXHIBIT "G."

Statement of Account of the Washington Loan and Trust Company, Trustee, Estate of Theodore J. Mayer.

NOVEMBER 19, 1908.

Chandlee Cottage—Received from Fisher & Co.				38.
"	"	—Carter	June 14, 1907.....	40.
"	"	"	July 14.....	40.
"	"	"	Aug. 14.....	40.
"	"	"	Sept. 14.....	40.
"	"	"	Oct. 14.....	40.
"	"	"	Nov. 14.....	40.
"	"	"	Dec. 14.....	40.
"	"	"	Jan. 14, 1908.....	40.
"	"	"	Feb. 14.....	40.
"	"	"	M'ch 14.....	40.
"	"	"	Apr. 14.....	40.
"	"	"	May 14.....	40.
"	"	"	June 14.....	40.
"	"	"	July 14.....	40.
"	"	"	Aug. 14.....	40.
"	"	"	Sept. 14.....	40.
"	"	"	Oct. 14.....	40.
"	"	"	Nov. 14.....	40.

Laboratory—Gates Apr. 15/07 to		
" " M'ch 15, 1908.....	5000.	
" " Apr. 15, 1908.....	416.66	
" " May 15,.....	416.67	
" " a/c June 15,.....	413.06	
Return premium insurance, Old Colony # 21513	9.77	
Return premium insurance, Georgia Home....	9.77	
Repairs to plumbing (Artz) Chandlee Cottage..	.....	1.25
Insurance, $73,000. 1 year from June 1, 1907..	.....	1178.88
" 73,000. " " from June 1, 1908..	.....	1178.96
Bell & Company—repairs to plastering at Chandlee Cottage	.....	2.50
Galloway—repairs to Time Clock in Laboratory.	.....	2.
Marsden— " " plumbing Chandlee Cottage	.....	3.50
Taxes—1907	.....	284.69
" 1908	.....	287.86
Walker—repairs to furnace Chandlee Cottage..	.....	3.
Carter (Marsden for repairs) repairs to plumbing Chandlee Cottage.....	.....	4.
Stutz repairs to plumbing—Chandlee Cottage..	.....	5.
Carter—repairs to plumbing Chandlee Cottage.	.....	1.50
" " " " " .	.....	2.25
Brandenburg and Brandenburg, professional services *in re* Chevy Chase property.....	.....	1000.
Commission	.....	351.20
Balance	.....	2717.34
	7023.93	7023.93

61 *Answer of The George Washington University.*

Filed December 16, 1908.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 28094.

THEODORE ALBERT MAYER, Complainant,

vs.

THE AMERICAN SECURITY & TRUST COMPANY, Executor and Trustee under the Last Will and Testament of Theodore J. Mayer, Deceased, *et al.*, Defendants.

Now comes the defendant, The George Washington University, and for answer to the bill of complaint in this cause filed, or such parts thereof as it deems necessary and proper for it to answer unto, it answering says:

That for the purpose of this suit, while not having personal knowledge of all the matters and things set forth in the bill of complaint in this cause filed, it admits said allegations thereof to be true.

Further answering said bill of complaint this defendant says that by reason of the impossibility of the performance of the condition attached to the Declaration of Trust executed by Theodore J. Mayer, in his lifetime, wherein and whereby certain property known as the Chevy Chase property was conveyed to The Washington Loan & Trust Company to be held by it in trust for this defendant, it has been unable to perform fully the conditions set forth in said
62 Declaration of Trust. It, therefore, has notified the Trustee, the defendant, The Washington Loan & Trust Company, as alleged in the bill of complaint, that it disclaims any further or other interest in the said Chevy Chase property and the letters patent, also embraced in said Declaration of Trust. This defendant, however, in making this disclaimer does not intend to renounce any other or further rights which it may have as a residuary legatee under the last will and testament of the said Theodore J. Mayer, deceased.

THE GEORGE WASHINGTON UNIVERSITY,
By CHAS. W. NEEDHAM, *President.*

JOHN B. LARNER, *Attorney.*

Charles W. Needham, being first duly sworn deposes and says that he is the President of The George Washington University; that he has read the foregoing answer by him subscribed and knows the contents thereof; that the facts therein stated upon his personal knowledge are true and as to those stated upon information and belief he believes them to be true.

CHAS. W. NEEDHAM.

Subscribed and sworn to before me this 16th day of December 1908.

[SEAL.] JOHN A. PETTY,
Notary Public.

63 DEFENDANT'S EXHIBIT 'H.'

Filed December 22, 1908.

BASS ROCKS, GLOUCESTER, MASS., *July* 23, 1907.

Thomas Bradley, Esq., The Washington Loan & Trust Co., Washington, D. C.

DEAR SIR: Your favor of the 19th instant, forwarded to me here, is received. Answering your questions and also the statements in Mr. Mayer's letter, I beg to say:

In January last Mr. Theodore J. Mayer, since deceased, sent me the proposition in writing, a copy of which is set forth in the letter of The American Security and Trust Company, copy of which you enclose with your letter. This tender by Mr. Mayer was presented

to, and was duly accepted by the Board of Trustees of The George Washington University. The Van Ness property referred to was sold and negotiations entered into for the purchase of the Dean property referred to in Mr. Mayer's letter. This property, known as Oak Lawn, was offered to the University for Six hundred thousand dollars net, upon condition that a building to be erected thereon by the University should be called Dean Hall in memory of the late Mr. & Mrs. Dean. This price was considered by some of the Trustees and the late Mr. Mayer as too much for the property and an effort was made and is still being made to secure the property at a reasonable price. It was also thought prudent, by the Trustees and also by Mr. Mayer, that we secure options upon some
64 adjoining properties before consummating the purchase of Oak Lawn. While these negotiations were pending and to give time to complete them, Mr. Mayer executed the deed conveying the Chevy Chase property to your Company upon the trust expressly set forth in the declaration of trust executed by the Company and vesting in the Company the power to determine what should be a "reasonable time" within which the University must complete the purchase. By this act Mr. Mayer rescinded from the limitation of time fixed in his letter addressed to me of date January twenty-second. To have fixed a date would have given the owners of Oak Lawn a decided advantage in the negotiations as to the price to be paid therefor.

At the April meeting of the Board of Trustees of the University the purchase of Oak Lawn was fully considered and formal action taken, which is of record, authorizing the purchase upon the condition named, at the net price of five hundred and fifty thousand dollars. This was communicated to, and taken under advisement my the owners of the property. Shortly before leaving Washington on my vacation I was verbally informed that the owners would not accept less than the six hundred thousand dollars named in their offer. So many of the members of our Board had then left the city for the summer that a special meeting could not be held and further consideration and action upon the money consideration must go over until the October meeting. These negotiations were in strict accord with the views and advice of the late Mr. Mayer. I visited him twice during his illness after the deed had been executed
65 to your Company and advised with him fully about the matter. He expressed great satisfaction that Van Ness Park had been sold in compliance with his letter, as he was strongly opposed to that location. He was also much gratified with the action of the Board of Trustees in approving Oak Lawn as the site for the University and advised me to secure options upon some other properties, if possible, and to get the property at a reasonable price. Mr. Mayer did not express any dissatisfaction at any time with our efforts or plans nor did he at any time after the sale of Van Ness Park and the execution of the deed to your Company mention any date or time when the purchase of Oak Lawn should be completed, but he did say to me that your Company would deal fairly in carrying out the trust.

Under all the circumstances and in view of the fact that the University has complied with part of the conditions named by Mr. Mayer,—the sale of Van Ness Park and approving of Oak Lawn as the site, and is negotiating for the purchase, it would be unfair to embarrass the matter by naming a short time within which the purchase shall be completed. Such action, if known, would be giving the owners a decided advantage and might result in their raising the price at which the property has been offered.

I submit that no rights are suffering or being endangered by reason of the delay; your Company holds the property and the proceeds thereof for whoever shall finally be entitled to them. One year is always considered a reasonable time within which to settle an estate.

Permit me also to call your attention to relative dates of the Will
66 under which the American Security & Trust Company is acting, the deed to your Company and the declaration of trust, and the fact that by the express terms of the latter the property reverts to the "heir" in case of default on the part of the University, and does not go to the Executor.

In conclusion I beg to express the hope that your Company will exercise its discretion in determining "reasonable time" in the interest of carrying out the generous provision made by Mr. Mayer for higher education and for a memorial to his deceased wife after whom the building provided for is to be named.

With great respect, I am,

Sincerely yours,

(Signed) CHARLES W. NEEDHAM.

67 *Replication.*

Filed December 22, 1908.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

No. 28094. Equity.

THEODORE J. MAYER
vs.
AMERICAN SECURITY & TRUST CO. ET AL.

The complainant joins issue with the defendants on their answers filed herein.

BRANDENBURG & BRANDENBURG,
Attorneys for Complainant.

Stipulation for Hearing.

Filed December 22, 1908.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

No. 28094. Equity.

THEODORE J. MAYER
vs.
WASHINGTON LOAN & TRUST CO. ET AL.

The parties complainant and defendant in the above entitled cause hereby agree that the same may be heard upon the bill
68 and answer forthwith without being placed upon the calendar for hearing.

BRANDENBURG & BRANDENBURG,
Attorneys for Complainant.
WM. F. MATTINGLY,
Sol. for Am. Sec. & Trust Co.
JOHN B. LARNER,
Attorney for Defendants, Washington Loan & Trust Co. & George Washington University.

Decree Dismissing Bill.

Filed December 31, 1908.

In the Supreme Court of the District of Columbia.

No. 28094. In Equity.

THEODORE ALBERT MAYER, Complainant,
vs.
AMERICAN SECURITY AND TRUST COMPANY, Executor and Trustee, *et al.*, Defendants.

This cause came on to be heard at the present special term, was argued by counsel for the complainant and the American Security and Trust Company, defendant, and having been duly considered by the Court and it appearing to the Court that the real and personal property and patent rights mentioned and described in the proceedings in this cause, conveyed and assigned to the defendant, the Washington Loan and Trust Company, by Theodore J. Mayer, and held by said Washington Loan and Trust Company upon the
69 trusts set forth in its declaration of trust relative thereto as stated and set out in the VII paragraph of the Bill of Complaint in this cause, passed to said American Security and Trust Company under the residuary clause of the will of said Theodore J. Mayer, and that it is the duty of said Washington Loan and Trust Company to reconvey said real and personal property and patent rights to said American Security and Trust Company in fee simple, to hold upon the trusts and for the purposes set forth in said will:

it is this 31st day of December, A. D. 1908, adjudged, ordered and decreed that the Bill of Complaint in this cause be and the same hereby is dismissed; and that the complainant pay the costs in this cause to be taxed by the Clerk.

JOB BARNARD, *Justice.*

From the above decree the complainant appeals in open court and the penalty of the appeal bond for costs is hereby fixed at $100.

JOB BARNARD, *Justice.*

Memorandum.

January 4, 1909.—Appeal bond filed.

70 *Directions to Clerk for Preparation of Transcript of Record.*

Filed January 4, 1909.

In the Supreme Court of the District of Columbia, the 4th Day of January, 1909.

Equity. No. 28094.

T. A. MAYER
vs.
THE WASH. LOAN & TRUST CO. ET AL.

The Clerk of said Court will please prepare the record on appeal, containing the following: bill and exhibits; answers & exhibits; decree & bond.

BRANDENBURG & BRANDENBURG,
Attorneys for Complainant.

71 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 70, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 28094, Equity, wherein Theodore Albert Mayer is Complainant and American Security & Trust Company, Executor, &c. *et al.,* are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 1st day of February, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1987. Theodore Albert Mayer, appellant, *vs.* American Security & Trust Company, executor, &c., *et al.* Court of Appeals, District of Columbia. Filed Feb. 2, 1909. Henry W. Hodges, clerk.

In the Court of Appeals, District of Columbia.

THEODORE ALBERT MAYER,
Appellant,

vs.

THE AMERICAN SECURITY & TRUST CO., EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF THEODORE J. MAYER, DECEASED, WASHINGTON LOAN & TRUST CO., TRUSTEE, AND GEORGE WASHINGTON UNIVERSITY,
Appellees.

No. 1987.

BRIEF OF APPELLANT.

EDWIN C. BRANDENBURG,
CLARENCE A. BRANDENBURG,
F. WALTER BRANDENBURG,
Attorneys for Appellant.

In the Court of Appeals, District of Columbia.

JANUARY TERM, 1909.

THEODORE ALBERT MAYER,
Appellant,
vs.
THE AMERICAN SECURITY & TRUST CO., EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF THEODORE J. MAYER, DECEASED, WASHINGTON LOAN & TRUST CO., TRUSTEE, AND GEORGE WASHINGTON UNIVERSITY,
Appellees.
No. 1987.

BRIEF OF ARGUMENT FOR APPELLANT.

The question involved in this case is as to the right of the appellant to the immediate possession and control of the property described in the complaint as the Chevy Chase property, which is located in the State of Maryland, as well as certain patent rights of doubtful value.

Upon consideration of the bill filed for the purpose of obtaining such possession and control, by the appellant, the son and sole heir of Theodore J. Mayer, deceased, the court below denied the relief prayed and ordered the bill to be dismissed.

It appears that on February 5, 1907, Theodore J. Mayer, since deceased, by deed conveyed the Chevy Chase property to the Washington Loan and Trust Company in fee (R., p. 15). Subsequent to the execution of this conveyance, or at or about the same time, the Trust Company, Mayer and the George Washington University

united in an agreement, without date, which recites the conveyance of said property to the Trust Company in fee, "and although the said deed purports to convey to said grantee an absolute title to the said property, the same is held by the Washington Loan and Trust Company for the use and benefit of the George Washington University" in trust to convey the same, in fee simple, to said University when and at such time as it should acquire title to what was known as the Dean property, located in the City of Washington, for the purpose of a site for the University and in order that a memorial building might be erected thereon to the memory of the deceased wife of said Mayer, with a further provision that in the event of the failure of the University to comply with the terms thereof within a reasonable time, to be determined by the trustee, the property should be reconveyed to said Theodore J. Mayer, "his heirs or assigns." (R., pp. 4-6.)

Ten days after the execution of this deed, and on February 15, 1907, Mr. Mayer executed his last will and testament in which he makes no reference whatever to this particular property (R., p. 10). At the time of his death he was the owner of other real estate and personal property of great value. It appears from the pleadings that irrespective of this particular property, the remaining assets and estate are sufficient to pay in full all the legacies directed to be paid by the provisions of his will.

By the terms of the will, after making various bequests and devises, the testator, by the twenty-first paragraph thereof, made the following provision:

> "All the rest and residue of my *estate,* real, personal and mixed, *which I now possess,* or which may *hereafter be acquired by me* and wheresoever situate, I give, devise and bequeath unto the American Se-

curity & Trust Company, * * * in trust," etc. (R., p. 12.)

It is claimed on behalf of the appellee, the American Security & Trust Company, that the Chevy Chase property passed to it under this residuary clause of the will and is to be held by it in trust for the complainant until he attains the age of forty-eight years and then to convey the same to him in fee. On the other hand, the appellant claims that the testator, at the time of the execution of his will, and continuously thereafter, until the time of his death, had no devisable interest in said Chevy Chase property and that the same devolved upon him as the testator's son and sole heir; and further, and even if the interest of the testator was devisable, that the intention of the testator to devise the same does not appear in the will and even if it does so appear, that he did not use apt words for the purpose. Furthermore, in this cause the bulk of the estate which is held in trust for the appellant by the American Security & Trust Co., as trustee, until he reaches forty-eight years of age is not involved.

It will be noted that the time for the performance of the condition upon which the title of the Chevy Chase property was to be conveyed to the University, was fixed by the Washington Loan and Trust Company, trustee, pursuant to the power contained in the trust agreement, at a date subsequent to the death of Mr. Mayer, so that the right to reconveyance, under the terms of the trust agreement, did not arise during his life time as appears from the pleadings but 19 months thereafter.

By the terms of the will the appellant is to receive the entire estate of the testator, including this Chevy Chase property if it passes under the will, upon attaining the age of forty-eight years and the effect of the grant of the relief prayed for by the appellant is merely to give him

the immediate possession of this particular property instead of deferring his right to possession and enjoyment until he attains the age stated.

The proper determination of the question whether, on failure of the University to perform the condition of the trust which entitled it to a conveyance, the property should be reconveyed to the heir of Theodore J. Mayer, who is the appellant, or to the American Security & Trust Company, the trustee under his will, involves the determination of four propositions, namely—

First: What was the nature of the interest remaining in Mr. Mayer, if any, after the execution of the deed to the Washington Loan & Trust Company, before failure of the University to perform the condition.

Second: Whether said interest could be devised.

Third: If so, whether the intention of the testator to actually devise the same can be gathered from the will itself in the light of the circumstances attending its execution; and,

Fourth: Assuming such intention exists, whether apt words have been used to devise the same.

ASSIGNMENTS OF ERROR.

1st. The Court erred in ordering the bill of complaint dismissed.

2d. The Court erred in failing to order the property involved in the bill of complaint to be turned over to the complainant.

3d. The Court erred in holding that the interest of Theodore J. Mayer in the property involved in the bill of complaint, prior to the determination of the University not to purchase the Dean property, was such as would pass under his will.

4th. The Court erred in holding that the title to the property involved in the bill of complaint passed under the will of Theodore J. Mayer, to the American Security & Trust Co.

THE NATURE OF THE INTEREST REMAINING IN GRANTOR.

On behalf of the appellant it is contended that the conveyance by Mr. Mayer in fee to the Washington Loan & Trust Company and the trust agreement referred to, was a grant upon condition subsequent; that until forfeited, Mr. Mayer had merely a possibility of reverter or reconveyance.

In considering the questions involved in this case, we assume the laws of Maryland, the situs of the property, will control.

The deed to the Washington Loan & Trust Company was an absolute deed, conveying every vestige of title and interest of the grantor, without any reservation or condition of any character. The deed carried with it the right of possession and this right of possession was exercised by the trustee through a tenant from whom it collected rents, which it still retains as appears by its answer, and which were to be turned over to the University with the property upon the condition hereinbefore set forth. The trust agreement expressly provides that the trustee not shall hold the property, but that the property *"is held* by the Washington Loan & Trust Company for the use and benefit of the George Washington University."

In this case we are not concerned with the nature of the estate or interest acquired by the University under the deed and trust agreement. We are merely concerned with determining the nature of the estate or interest remaining in Mayer after he made the conveyance to the

Washington Loan & Trust Company. Had the conveyance been made direct to the University there could be no question but that the provision for the acquisition of the Dean property created a condition subsequent. The result is no different so far as Mayer is concerned because he conveyed the property to a third person. The conveyance was of the fee and he was to be entitled to a reconveyance only in case the University failed to acquire the Dean property and in that event, his interest was not to revest pursuant to any limitation contained in the grant, but pursuant to an express collateral agreement for a reconveyance which, in legal effect, is the equivalent of a re-entry, as will hereafter appear. Until breach of condition and re-entry or until the exercise of its legal equivalent, the reconveyance of the property, the grantor had nothing more than a *possibility of reverter* or reconveyance, as stated in the leading authorities, if indeed in this instance he had that much. The test whether the transaction, so far as Mayer is concerned, created a condition subsequent is dependent upon and controlled by the fact that he parted with the title to his property. The passing of the title determines whether the condition under which the title is to revert is a condition precedent or subsequent. The passing of the title *from* Mayer was not dependent upon the performance of the condition by the University. The title had already actually passed by his deed in fee to the trustee, and so far as his interest is concerned, after the conveyance, it was exactly the same as if he had conveyed the property to the University upon condition that it should revert or be reconveyed upon failure to acquire the Dean property within a reasonable time, or if acquired had failed to erect the memorial.

When a man makes a grant and parts with every vestige of his title and his right to reconveyance arises only

on failure of a subsequent event, it is a grant upon a condition subsequent. The test, as laid down in the books, for determining the nature of the interest remaining in the grantor and the nature of the interest conveyed is, whether by the conveyance, and at the time of the conveyance, the grantor parted with his title. If he did, then the happening of the event which would entitle him to a reconveyance, is a condition subsequent.

> "If land is conveyed upon a condition precedent the title will not pass until the performance of the condition. But if the condition is subsequent, the title passes at the time at which the deed is executed and delivered."
>
> Devlin on Deeds, Sec. 958.

Negatively stated, if the title is not passed, the condition is precedent, but if the title does pass at the time the deed is executed, the condition is subsequent.

In Hayden vs. Inhabitants of Stoughton, 5 Pick., 528, the Court held in that case that the grant was a condition subsequent because "the fee did not rest in abeyance until the school house should be built but was to be forfeited if it should not be built in a reasonable time."

If the grant had been made to the University by the conveyance of all the rights of the grantor with a provision that if it failed to acquire title to the Dean property within a reasonable time there should be a reconveyance, it would be a condition subsequent, although its performance *preceded* the vesting of the absolute fee, the test being as above indicated, whether the title passes.

The testator interposed the Washington Loan & Trust Company to act for the University and instead of reserving the right of making a formal re-entry himself for breach of condition subsequent, as would have been the case if the conveyance had been direct to the University,

he authorizes the Trust Company to take the steps necessary to revest him with his former estate, to wit, by the reconveyance of the property.

Counsel for appellee argued and the court below suggested, as a reason for its decree, that the conveyance to the Washington Loan & Trust Company was no different from the ordinary deed of trust by which property is conveyed to a trustee to secure the payment of a debt, with power of sale and provision for reconveyance upon payment. We submit for many reasons that there is no element of similarity between such a conveyance and the conveyance now under consideration. Thus: (1) In the case of a deed of trust, the conveyance is in trust to secure a debt, the grantor retains possession. Possession was not retained under the conveyance made to the Washington Loan and Trust Company, but passed to it.

(2) In the former case, the right to receive rents and profits is reserved. Here the rents passed to and were collected by the trustee and are still held by it.

(3) In the former the right to a reconveyance exists upon payment of the debt. In this case there was not only no such right but upon the performance by the University of the condition, it became entitled to a conveyance in fee, without any further action on the part of Mayer, without consulting him and even against his wish, if he had so expressed it.

(4) In the former, he might at any time secure a return of the property by satisfying the note secured thereby. In this case it would have been impossible for him to have recovered the property until the breach of the condition on the part of the University to buy the Dean property, or if purchased had failed to erect the memorial, however much he may have regretted his gift and desired to secure a return of the property.

(5) In the former, the property is held by the trustee for the use and benefit of its owner, subject to the payment of the indebtedness secured thereby. In this case, the property was held for the use and benefit of the George Washington University and not for the grantor.

(6) In the former the beneficial title or interest remains in the grantor. In this case, the beneficial interest or title remained in the University from the date of the execution of the deed in fee by Mayer until the determination of the University that it could not acquire the Dean property and thereby become entitled to a formal transfer from the Washington Loan and Trust Company, and all that Mayer retained was the right of entry or its equivalent, a right to demand reconveyance upon default of the University.

(7) In a deed of trust upon the satisfaction of the obligation thereby secured, the trustees by proper release, certify of record that the obligation has been satisfied, while in the case at bar it required an absolute deed in fee to revest title in Mayer.

(8) In the former there is a power of sale; here there is not.

(9) In the former, there remained an equity of redemption, accompanied by possession, which is undoubtedly an estate capable of being devised. In this, there is not. A conveyance in trust to secure the payment of a debt is no different from an ordinary mortgage. In equity, such a conveyance of land is a mortgage if it leaves a right to redeem upon payment of the debt.

In Shillaber vs. Robinson, 97 U. S., 75, the Supreme Court said:

> "It is the well settled doctrine of courts of equity, that a conveyance of land, for the purpose of secur-

> ing payment of a sum of money, is a mortgage, if it leaves a right to redeem upon payment of the debt. If there is no power of sale, the equity of redemption remains until it is foreclosed by a suit in chancery, or by some other mode recognized by law. If there is a power of sale, whether in the creditor or in some third person to whom the conveyance is made for that purpose, it is still in effect a mortgage, though in form a deed of trust, and may be foreclosed by sale in pursuance of the terms in which the power is conferred, or by suit in chancery."

The case of Wilson vs. Galt, 18 Ill., 430, is in all respects the same as the case under consideration. It appears in that case that Wilson, being desirous to secure the prompt completion by a certain date of a dam across a river, conveyed certain land in fee to one John Galt in trust, first, in case a certain Hydraulic Company should build a dam on or before a certain date then to convey the property to that Company in fee, but in case the Company failed to build the dam within that period "then the conveyance should be null and void."

In that case the provision for defeasance was contained in the grant itself. In construing this deed, the Supreme Court of Illinois said:

> "The condition annexed to the deed of trust from complainants to John Galt, the trustee, seems to have a two-fold object: first, as a condition precedent, its performance was necessary to raise the power and duty in Galt, the trustee, to convey the premises to defendants; and second, as *a condition subsequent,* to defeat or destroy the estate in fee conveyed to Galt in trust and to revest it thereupon in the grantors. * * * There is no doubt, uncertainty or ambiguity in this deed. The intention and the meaning are alike clearly expressed. The fee passed to Galt as a trustee. *It was subject to a*

> *condition subsequent* by the non-performance of which the estate in Galt is destroyed and revests in the grantors."

This case is even stronger, however, because instead of having the title revest, upon non-performance of the condition subsequent, as in the Galt case, the trust agreement expressly provides that before title should revest in Mayer there must be a formal reconveyance.

If any doubt could remain, notwithstanding what has been stated, that the grant was a condition subsequent, so far as Mr. Mayer is concerned, it would seem to be completely set at rest by the decision of the Supreme Court of the United States in Schulenberg vs. Harriman, 88 U. S., 44 (21 Wall.), a case that was not controlled or affected at all by any consideration of local statutory law.

Congress granted certain lands to the State of Wisconsin to aid in the construction of railroads. The grant provided that the lands should be subject to the disposal of the Legislature and enacted that if the road should not be completed in ten years, no further sale should be made and the unsold land should revert to the United States. The State accepted the grant and assumed the execution of the trust. The road was never constructed. Congress did not pass any Act nor were any judicial proceedings taken to declare a forfeiture of the grants. The Court held that the Acts were grants *in præsenti* and passed the title and when the route was fixed the title, which was previously imperfect, became attached to the land. The Court held the provision that the unsold lands after ten years should revert, is a condition subsequent, being in effect, a provision that the grant should be void if the work designated was not done within that period. In the opinion the Court said:

"That the Act of Congress of June 3, 1856, passed a present interest in the lands designated there can be no doubt. The language used imports a present grant and admits of no other meaning. The language of the first section is, 'That there be, and is hereby granted to the State of Wisconsin,' the lands specified. The 3rd section declares 'That the said lands hereby granted to said State shall be subject to the disposal of the Legislature thereof;' and the fourth section provides in what manner sales shall be made, and enacts that if the road be not completed within ten years 'No further sales shall be made, and the lands unsold shall revert to the United States.' The power of disposal and the provision for the lands reverting both imply what the first section in terms declares, that a grant is made; that is, that the title is transferred to the State. It is true that the route of the railroad, for the construction of which the grant was made, was yet to be designated, and until such designation the title did not attach to any specific tracts of land. The title passed to the sections, to be afterwards located; when the route was fixed, their location became certain and the title, which was previously imperfect, acquired precision and became attached to the land. * * * (p. 60.)

"Numerous other decisions might be cited to the same purport. They establish the conclusion that, unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts. * * * (p. 62.)

"The provision in the Act of Congress of 1856, that all lands remaining unsold aften ten years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed. In Shephard's Touchstone it is said: 'If the words in the close or conclusion of a condition be

> thus: that the land shall return to the enfeoffer, etc., or that he shall take it again and turn it to his own profit, or that the land shall revert, or that the feoffer, shall recipere the land, these are, either of them, good words in a condition to give a re-entry —as good as the word "re-enter"—and by these words the estate will be made conditional.' The prohibition against further sales, if the road be not completed within the period prescribed, adds nothing to the force of the provision. A cessation of sales in that event is implied in the condition that the lands shall then revert; if the condition be not enforced the power to sell continues as before its breach, limited only by the objects of the grant, and the manner of sale prescribed in the Act." (p. 63.)

In the case just referred to, it is apparent the State had no beneficial interest in the property and in that respect it occupied the same position as that of the Washington Loan & Trust Company in this case. The State merely held the land in trust for the Railroad Company, when the road should be constructed. The Railroad occupied the same position, in that case, that the University occupies in this. There, the Railroad Company acquired no title except upon the completion of the Railroad within the time stipulated. Here the University acquired none until the purchase of the Dean property. The Supreme Court held because the grant to the trustee, the State, was a grant *in praesenti* of the fee, that the condition, *so far as the United States is concerned,* was a condition subsequent although the construction of the Railroad was, as to the Railroad, *a condition precedent* to the vesting of the title in it; that is to say, while it was a condition precedent as to the railroad, it was a condition subsequent as to the Government. That case is in all respects like the case at bar and would seem to remove all doubt upon the question that in this case, so far as Mr. Mayer is concerned, the grant was a grant upon condition subsequent.

A POSSIBILITY OF REVERTER IS NOT AN INTEREST OR ESTATE IN LAND THAT CAN BE DEVISED OR ASSIGNED.

What has been stated determines, we believe, that the grant made by Mayer was a grant upon condition subsequent. No default having occurred in his life time, and in fact not until 19 months after his death, the interest remaining in Mayer at the time of making his will or at his death was a mere possibility of reverter or reconveyance and was not a devisable interest.

The rule that a right of re-entry or mere possibility of reverter, upon breach of a condition subsequent, was not assignable by deed or devisable by will at common law, is certainly free from doubt. This law against maintenance, as needs no citation of authority, has always been part of the law of Maryland and of the District of Columbia and has never been changed.

In some States where the common law rule against maintenance seems to be in force and in others, where it is not in force, as in New Jersey, it is held that *after* forfeiture for failure to perform a condition subsequent, an interest arises in the grantor which may be assigned or devised, but it is confidently submitted that the rulings of courts, where the matter has arisen for decision, in all the States where the common law rule is still in force, are practically unanimous in prohibiting a conveyance or devise of such a possibility *before* forfeiture for failure to perform a condition subsequent.

A few of the leading and best considered cases on the subject will be referred to.

In Vail vs. Long Island Railroad Company, 106 N. Y., 287, in construing a deed granting the way to the Railroad Company, the Court said:

"When a conveyance in fee is made upon a condition subsequent, the fee remains in the grantee until breach of condition and a re-entry by the grantor. The deed expressly conveys all the estate, title and interest of the grantors in the premises conveyed. The consideration is not nominal. The covenants of seisen or warranty run to the grantee, 'his (its) heirs and assigns forever.' There are no words limiting the estate conveyed, or which rebut the statutory presumption that the grantors intended to convey all their estate in the land. (1 R. S., 748, Sec. 1). The *possibility of reverter merely, is not an estate in land, and until the contingency happens the whole title is in the grantee.* (Craig vs. Wells, 11 N. Y., 315; Nicoll vs. N. Y. & E. R. R. Co., 12 *id.*, 121; 4 Kent Com., 370; Kenney vs. Wallace, 24 Hun., 478)."

In Towle vs. Remsen, 70 N. Y., 309, in dealing with the question of the right to convey a mere right to re-enter, the Court said:

"Precedent conditions are such as must happen or be performed before the estate can vest or be enlarged; subsequent are such as by the failure or non-performance of which an estate, already vested, may be defeated. (2 Black. Com., 154; 4 Kent, 125.)
* * *

"The grant most manifestly conveyed a present estate in fee simple which was liable to be defeated by a subsequent event, but which until that event occurred was vested in the grantees. The grantors evidently intended to pass, and did actually convey a title which was effective, until something transpired to disturb it. * * *

"No precise technical words are required to constitute a condition precedent or subsequent, and the construction, if such a condition must always be founded upon the intention of the parties. (3 Cruise Digest, 448, title 32, Chap. 24, Sec. 7, *id.*, title 13,

Chap. 1, Sec. 10; Blacksmith vs. Fellows, 3 Seld, 401; Underhill vs. Sargent & Washington R. R. Co., 20 Barb., 455; Spaulding vs. Hallenbeck, 39 *id.*, 79, 87.) Even when the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if the act may as well be done afterwards as before the vesting of the estate, the condition is subsequent. (Martin vs. Ballou, 13 Barb., 133.) * * *

"If the condition was a condition subsequent then it can only be taken advantage of by a re-entry by the grantors. And upon its determination the interest of the grantor and his representatives becomes a mere possibility of a reversion, incapable of being assigned. (Nicoll vs. N. Y. & E. R. R. Co., 12 N. Y., 121.) A right of re-entry for a breach of a condition subsequent does not pass by a conveyance of the lands, and until there is a re-entry by the grantor or his heirs, or the successors of the grantor for a breach of the condition. The estate is not forfeited, but remains unimpaired in the grantee. A mere stranger cannot take advantage of it. (*Ibid;* Schulenberg vs. Harriman, 21 Wall., 63; Fonda vs. Sage, 46 Barb., 109; Underhill vs. S. & W. R. R. Co., 20 Barb., 455; 4 Kent, 127; Hoyt vs. Dillon, 19 Barb., 644-651.)

"In the last case cited it is laid down by Brown, J., that a right of entry was not assignable, because as was said, 'under color thereof pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed,' and here was the origin of the rule embodied in our written law. (1 R. S., 739, Sec. 147.)

"In Greenleaf's Cruise on Real Property (Vol. 1, title 13, Chap. 1, Sec. 15), the reason of the rule of the common law that the estate is not defeated, although the condition be broken until entry by the grantor or his heirs, is stated to be, that it is a maxim of law that 'nothing which lies in action, entry, or re-entry, can be granted over in order to discourage maintenance.' There is no interest to

assign before the breach, and after that the right of entry, as we have seen, is not capable of being transferred."

In De Peyster vs. Michael, 6 N. Y., 506, a carefully considered case in which the history of the law concerning tenures is carefully reviewed by Chief Justice Ruggles, in speaking of the right of re-entry and its nature, the Court said:

"The right of re-entry for non-payment of rent, or the non-performance of other covenants, is not such an interest in the estate as makes the condition in question valid. It is not a reversion, nor is it the possibility of reversion, nor is it in any estate in the land; it is a mere right or chose in action, and if enforced, the grantor would be in *by the forfeiture of a condition, and not by a reverter.* At common law, a right of entry being a mere right of action, could not be granted over. (Co. Litt. 214; 2 Cruise, title 18, Chap. 1, Sec. 15.) It is only by statute that the assignee of the lessor can re-enter for condition broken. But the statute only authorized the transfer of the right, and did not convert it into a reversionary interest, nor into any other *estate.* It is a totally different interest from the possibility of reverter spoken of by Coke, and in the Touchstone; it is no more than the *possibility of a forfeiture.* When property is held on condition, all the attributes and incidents of absolute property belong to it, until the condition be broken; and this is especially true, when, as in this case, the person entitled to the benefit of the condition, is not in any degree affected in his right, under the condition, by the exercise and enjoyment of those attributes and incidents. The lessor's right of entry for breach of the lawful conditions, are not defeated or impaired, by the sale of the lessee's interest in the land."

In Nicoll vs. N. Y. & Erie R. R. Co., 12 N. Y., 131,

there was a grant to the defendant of a tract of land upon condition that the defendant should construct a railroad within a limited time. After the grant but before breach, the interest remaining in the grantor was conveyed to the plaintiff who sued the defendant to recover the possession of the premises for breach of the condition. In the opinion of Parker, Justice, page 131, it is said:

> "A mere failure to perform a condition subsequent does not divest the estate. The grantor or his heirs may not choose to take advantage of the breach, and until they do so, by entry, or by what is now made by statute its equivalent, there is no forfeiture of the estate. This was the common law, and it has not been altered by statute so as to give a right of entry to an assignee in any instance not coupled with a reversionary interest, as in the cases of estates for years and for life, except in cases of leases, or rather of grants in fee, reserving rent. To that extent the law was changed in England by 32 Henry VIII, Ch. 34; and similar enactments have been made in several of the States. In this State, these provisions will be found at 1 R. S., 748, Secs. 23, 24 and 25, and are limited to grants or leases in fee reserving rents, and to leases for lives and for years. As to other grants upon condition, the common law is unchanged. (2 Kent, 123.)
>
> "There was a reason for the statutory change in the particular cases mentioned; for in them the grantor had an interest independent of the possibility of reverter. In the cases of a grant or lease in fee, though the grantor has no reversion, he has an interest by way of annual rents reserved, and in the cases of leases for lives and years, he has an actual reversion of what remains after the expiration of the particular estates. In these cases, therefore, he has a vested interest, and may well be permitted to assign with it, and his assignee to take with such interest, his right of entry for non-performance of a condition subsequent; for the right to enforce a for-

feiture is necessary to the collection of the rents and to the protection and enjoyment of the reversion. But where a fee simple, without a reservation of rents, is granted upon a condition subsequent, as in this case, there is *no estate* remaining in the grantor. There is simply a *possibility of reverter, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone.* It has been said such possibilities were assignable in equity; but those were interests of a very different character, as I will presently show. So far from including these, Kent says (4 Kent's Com., 130): 'A court of equity will never lend its aid to divest an estate for the breach of a condition subsequent,' and the chancellor acted upon that rule in Livingston vs. Stickles. (8 Paige, 398.)

"All contingent and executory interest were assignable in equity, and would be enforced if made for a valuable consideration. (4 Kent, 269.) But these words had an ascertained legal signification; and it was never claimed that they were applicable to a case like that under consideration. It will hardly be pretended that Dederer's possibility of reverter was a contingent or an executory interest, in the legal sense of these words.

"By the Revised Statutes (1 R. S., 725, Sec. 35), expectant estates are descendible, devisable and alienable, in the same manner as estates in possession; and it is claimed that Dederer had an expectant estate. But we are relieved from all doubt on this point, by the fact that the statute itself has furnished the definition of the term 'expectant estates.' They are described (1 R. S., 723, Sec. 9) as including future estates and reversions; and these expressions are also defined in Secs. 10 and 12. A future estate is one limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time. And by Sec. 13, a future estate is said to be *vested,* where there are persons in being who would

have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate; and 'contingent' whilst the person to whom or the event upon which they are limited to take effect, remains uncertain. A reversion is defined as the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of the particular estate, granted or devised. I have been thus particular in transcribing these statutory definitions of 'expectant estates' to show, what is apparent, that they are not in the least applicable to the case under consideration. Though as Chancellor Walworth said (in 7 Paige, 76): 'They include every *present, right and interest,* either vested or contingent, which may by possibility vest at a future day,' yet *they do not include the mere possibility of a reverter, which the grantor has after he has conveyed in fee on condition subsequent. He has no present right or interest whatever, and no more control over it than a son has in the estate of his father who is living.* The provision of the Revised Statutes, by which expectant estates are made alienable, no doubt covers the same class of interests which, before, were only assignable in equity. They are now assignable at law as well as in equity.

"Kent says (4 Com., 370), that the grantor of an estate upon condition has only a possibility of reverter and no reversion; and in the note to page 11 of the same volume he says, 'there is only the possibility of reverter left in the grantor and not an actual estate,' citing Martin vs. Strachan, 5 Term R., 107 (note). For examples illustrating the distinction between a naked possibility and a possibility coupled with an interest, see 4 Kent Com. 262, note b, and Jackson vs. Waldron (13 Wendall, 178), and Fortescue vs. Satterthwrite, 1 Iredell N. C. R., 570.

"Suppose A sells to a banking corporation in fee, by express words, a lot of land on which to build a banking house. If the bank does not sell that land, but retains it until the expiration of its charter, it will

revert to him, or, if he be dead, to his heirs. Now, what estate had A after he had conveyed in fee to the bank? None whatever. He had only a possibility of a reverter—a naked and very remote possibility, but nothing that he could convey to an assignee. He had sold his entire interest and received the full value of it. The presumption was it would never return. The law would not favor its return; and the grantee, who enjoyed the entire estate and upon whose volition alone it could return, would not be likely to so far neglect his own interests as to permit its return. A voluntary reconveyance would be hardly more improbable than a reverter. Just such an estate and no other had Dederer in this land when he conveyed to the plaintiff. In both cases, the estates granted were upon condition. In the case of the bank, the condition was implied in law. (Angell & Ames on Corp., 128). In this case the condition was expressed.

"What is meant by possibilities coupled with an interest is of a very different character, as may be seen by reference to 4 Kent Com., 262, and cases there cited, and 13 Wendell supra. Jicklings in his treatise on the analogy between legal and equitable estates says, that under the generic term of possibilities coupled with an interest may be classed all contingent and executory interests in land, as springing and shifting uses, contingent remainders and executory devises.

In the opinion of Gardiner, C. J., concurring, it is said:

"At the time of this conveyance, Dederer had the mere right to reclaim the premises for the non-performance of the condition. That such a right was not the subject of conveyance at the common law, is fully established by the authorities referred to by the Supreme Court, and those quoted by Judge Ruggles in the case of De Peyster vs. Michael, 2 Selden, 506, 507. But it is urged that the court below overlooked a provision of the Revised Statutes defining estates in expectancy, and declaring them

'descendible, devisable and alienable, in the same manner as estates in possession.' (1 R. S., 726, Sec. 35.) A future estate is defined to be an estate limited to commence in possession at a future day, and a reversion to be the residue of an estate left in the grantor or his heirs, commencing in possession on the determination of a particular estate granted. (Secs. 10, 12.) The right of Dederer was not a reversion, for he had parted with the fee. No remainder could have been limited upon a conditional fee by the common law, for the very conclusive reason that the first grantee took the whole estate, and there was nothing that was the subject of limitation. The definition contained in the 10th section was not intended to create any new estate, unknown to the law as then existing, but to apply the same principles to all classes of expectant estates. Hence, the revisers, in their note to the 10th section say: 'In conformity to our plan, and with a view to subsequent provisions, the definition in this section is so framed as to comprehend every species of expectant estates created by the act of the party, remainders, strictly so called, future uses and executory devises.' The words by 'lapse of time or otherwise,' they add, are necessary to provide for contingent limitations operating to abridge or defeat the prior estate; and the other variations from the ordinary definition of a remainder, are introduced to embrace estates *in futuro,* as they are technically termed. This is all very intelligible, but is very far from avowing a design to declare every contingency by which an estate might possibly be determined, a conditional limitation; or that a right, to arise upon a forfeiture by which an estate might be avoided, was itself an estate, either with or without a condition. A right of this sort, depending upon the non-performance of a condition by the grantee, was not an estate in the lands to which the condition pertained, either at the common law or by the Revised Statutes. Accordingly, in De Peyster vs. Michael, above referred to, we hold that the right of re-entry, for the non-pay-

ment of rent or the non-performance of other covenants, is not such an interest in the estate as would uphold the condition in that case; that it was not a reversion nor the possibility of a reversion, nor any estate in the land. It was a mere right in action, and if enforced, the grantor would be in by forfeiture of a condition and not by a reverter. (*Id.* 506.) The learned editor of Kent's Commentaries, in a note, after referring to the definition of future estates given in the 10th section of the R. S., and to the 35th section, above quoted, remarks, that this sweeping provision would seem to embrace every executory and contingent interest. (4 Kent, 7th Ed., 271, N. A.) If by this is meant that every executory and contingent interest in the language of the 10th section "limited" to commence in possession at a future day, is alienable, the remark may be correct. The word interest would merely be substituted for "estate," the term adopted in the statute. If, however, it is to be understood as intimating that a naked possibility, not arising from a limitation in a deed or devise, as of a son inheriting the estate of his father living at the time of the grant, is alienable, the doctrine is not, I apprehend, supported by anything in the statute upon which he is commenting.

"The distinction between a limitation and a condition is stated in the Commentaries of Chancellor Kent. The first determines the estate when the period of limitation arrives, without entry or claim. A condition does not, however, defeat the estate until entry by the grantor or his heirs, and upon entry, the grantor is in as of his former estate. (Kent's Com., 131, Vol. 4, 7th Ed.) When men of the high standing of the revisers introduced the legal term "limitation" into their definition of a future estate, there is every presumption that they used it in its ordinary legal sense, and in this sense it certainly does not include a condition subsequent."

In this same opinion the court, in discussing the nature of the condition, said:

"Whether a condition be one or the other is matter of construction, and depends upon the intention of the party creating the estate. (4 Kent, 124; 1 Term R., 645; 2 Bos. & Pull., 295; 3 Peter's U. S. R., 346.) In the latter case, Marshall, Ch. J., said: 'If the act (on which the estate depends) does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole instrument, the condition is subsequent.' In this case, it was evidently the design of the parties that the estate should vest at once, so that the grantee might proceed immediately with the construction of the road; otherwise a condition that it should be completed within a given time, or ever completed, would be impossible. From the character of the condition, it could not be a condition precedent. Possession and control of the land must necessarily accompany the construction and precede the completion of the road. The grant is not made to take effect on the happening of a certain event, but *in praesenti,* and liable to be divested by the grantee's failure to perform the condition. (See also 5 Ham., Ohio Rep., 389; 9 East R., 170; 5 Pick. R., 528; 18 Martin's Louis R., 221; Co. Litt., 246 b.) (p. 130.)

In Locke vs. Hale, 165 Mass., 20, it appeared that a parcel of land was granted upon a condition, with reversion to the grantor, his heirs and assigns, in case of breach. An assignee before breach sought to recover the land conveyed, basing his right upon the word "assigns" in the reversion. The Supreme Court held:

"The defendant has placed some stress on the word 'assigns,' in the provision creating the encumbrance. The right of entry for *breach of a condition subsequent is not assignable,* and if the provision is to be regarded as creating a condition subsequent the word was inapt. Hopkins vs. Smith, 162 Mass., 444. We think that, if it is not to be rejected altogether, it is

> to be regarded as inserted rather to show that the condition or restriction was a continuing one, than with a purpose to establish an easement or servitude in favor of the premises occupied by Johnson as a residence."

In Bouvier vs. Baltimore, N. Y. R. R. Co., 67 N. J. Law, 281, a grant was made to the railroad company, subject to a condition, with proviso of re-entry by the grantor, his heirs or assigns. *After* breach an assignment was made and the assignee sought to recover. The court notes the distinction between an assignment before breach and assignment after breach and distinctly holds that an assignment before breach cannot be made and likewise an assignment after breach cannot be made, in the absence of any legislation in a jurisdiction where the English Statutes against maintenance are in force, but held that such statute was not in force in New Jersey. In reviewing the entire subject the court said:

> "I find nothing definite said by the old reporters or law writers on the subject of transfer of rights of entry for condition broken, until Littleton, treating of estates upon condition, after noting the requirement of the law as to the reserving of rent wrote thus, as prefatory to a statement that the grant of the reversion of leased lands did not convey a right of entry for breach of condition to pay rent. * * *
>
> "The date of the publication of the Tenures is unknown, but Littleton died A. D. 1481. The statute of uses (27 Hen. VIII., c. 10), passed A. D. 1535, gave opportunity for much amelioration in the transfer of rights in land, but, beyond the introduction of conditional limitations, by which estates might be granted in remainder, on breach of condition of the first grantee's title, there seems to have been no judicial modification of Littleton's doctrine; and no legislative relief except that, in 1540, by 32 Hen. VIII., c. 34, the benefit of conditions in leases, for

life or years, reserving rent, were allowed to pass with the reversion.

"On the other hand, in the same year, Parliament enlarged the Pretended Titles Act of A. D. 1377 (1 Rich. II, c. 9, by 32 Hen. VIII., c. 9), forbidding bargain, sale or purchase of rights or titles in land where the grantor was not in possession. Not long afterwards Chief Justice Montagu declared that this statute was largely affirmatory. Partridge vs. Strange, Plowd, 77, 88.

"Coke, writing before A. D. 1628, in his comment on Littleton's declaration, gives the reason of the doctrine as follows:

> " 'Que nul entrie, etc. Here Littleton reciteth one of the maxims of the common law; and the reason hereof is for the avoyding of maintenance, suppression of right and the stirring up of suites; and, therefore, nothing in action, entrie or re-entrie, can be granted over; for so under colour thereof pretended titles might be granted to great men whereby right might be trodden downe and the weake oppressed which the common law forbiddeth as men to grant before they be in possession.' Co. Litt., 214 a.

"About the same time, in his remarks upon Lampet's case, 10 Rep., 46, 48, he wrote of 'the great wisdom and policy of the sages and founders of our law, who have provided that no possibility, right, title nor thing in action shall be granted to stangers, for that would be the occasion for multiplying of contentions and suits, of great oppression of the people and chiefly of terre-tenants and the subversion of the due and equal execution of justice.'

"To the same effect is the declaration on Bacon's Abridgement, the foundation of which work is generally attributed to Chief Baron Gilbert:

> " 'A possibility, right of entry, or thing in

> action, or cause or suit, or title for a condition broken, cannot be granted or assigned over by law; for, if this were permitted, it would promote maintenance and prove prejudicial to such as, being able to contend with those with whom the original contract was, might find themselves depressed by a powerful adversary.' Tit. "Assignment" A, and substantially the same statement tit. "Grants" D. Mr. Hargrave, in note 212 on Coke's Littleton, expresses the same view.

"It is needless to quote other writers or judges. All who give a reason for the doctrine ascribe it to the judicial desire to prevent maintenance.

"A distinction not always clearly made should, however, be borne in mind. Before breach, as in case of any determinable fee, there is in the grantor only a possibility of reverter. 4 Kent, Com. 11 n; Nicoll vs. New York & Erie Railroad Co., 12 N. Y., 121. After breach there is a vested right. Judge Hare, in his note to Dumpor's Case, Sm. Lead. Cas., 112, perspiciously states this distinction:

> " 'Before breach the reason why an assignee cannot take advantage of a condition really depends on the inherent incapacity of the condition itself. But after breach the condition itself is gone and there arises in its stead, whatever may be its terms, in the case of freehold estates, at all events when created by a common law conveyance, a right or title of entry which is as little capable of assignment as the condition, although the obstacle to its assignment is of a different nature, arising out of the policy of the common law and the provisions of the statute of maintenance which forbade the sale or transfer of claims or demands unsustained by possession and resting solely in entry or action.'

"In most of the States of the Union it has been

assumed that the English doctrine of non-transferability of rights of entry for condition broken is the law; and so it well may be as to *attempted transfers before breach;* but after breach it would seem that the test must be the existence or non-existence of the English law as to maintenance. Judge Hare, after the passage cited, argues that even in those States, like Pennsylvania, where it had been declared that the English statutes on that subject had never been adopted, an incapacity of transfer should still be maintained, for the reason that the title of the grantee on condition will endure until re-entry, but the argument is aside from the point. It is not the land, but the right of entry, that is the subject of the transfer. In Pennsylvania, after Judge Hare wrote, the question came before the Supreme Court for decision, and it was held, in a case where the condition was reserved to the grantor and his assigns, that the right of entry was subject to sale. Mr. Justice Rogers said: 'This is a fair case for the application of the maxim cessante ratione legis, cessat ipsa lex.' McKissick vs. Pickle, 16 Pa. St., 140. In the case in hand it will be noticed that the right of entry for breach of condition was reserved to the assigns, but I do not regard that as essential. I think that in any case, *wherever the English law against maintenance is not in force, a right of entry for condition broken should be held transferable after breach of the condition. Before breach I think transfer, to be legal, must be authorized by legislation.*

"In England, as before stated, by 32 Hen. VIII, c. 34, the benefit of conditions in *leases* for life or years reserving rent was allowed to pass with the reversion. By the Wills act of 1837 (1 Vict., c. 26, Sec. 3) all rights of entry for condition broken were made devisable, and in 1844, by 7 and 8 Vict., c. 76, Sec. 5, they were made assignable. This later legislation was the prototype of an enactment in this State, approved March 14, 1851 (Gen. Stat., p. 881), by which, under the title "An act to authorize the trans-

> fers of estates in expectancy,' such rights were included within an authority to devise, convey, assign or charge by deed contingent or executory interests and future estates and interests in expectancy in lands, tenements and hereditaments. * * *
>
> "In Schomp vs. Schenck, 11 Vroom 195, 204, it was rightly held, in the Supreme Court, that the English law against maintenance is not in force in New Jersey. The opinion of Chief Justice Beasley, in that case, makes this very clear."

In Berenbroick vs. St. Luke's Hospital, 23 App. Div., N. Y., 339, property was conveyed upon a condition subsequent with right of re-entry reserved to the grantor, his heirs or assigns. In the opinion the court said:

> "It is well settled that where a deed of property in fee is made, with a condition subsequent imposed and a right of re-entry reserved to the grantor, the right of re-entry is a mere right in action and not an interest in the land; that it is not assignable nor grantable; that it descends to the grantor's heirs, but does not pass by a conveyance. And any deed by which the original grantor or his heirs undertakes to transfer, assign or grant the land or the reversion of it while it may be ineffectual to convey title to the grantee, does operate to put an end to the rights of the grantor. (6 Am. & Eng. Ency. of Law, 904; Underhill vs. S. & W. R. R. Co., 20 Barb., 455; Post vs. Weil, 8 Hun., 418; 2 Washb. Real Prop. (5th Ed.), 14-16; Gerard Tit. to Real Est. (3d Ed.), 118; Tinkham vs. Erie Railway Co., 53 Barb., 393, 396; De Peyster vs. Michael, 6 N. Y., 468, 506; Nicoll vs. N. Y. & Erie R. R. Co., 12 *Id.*, 121; Towle vs. Remsen, 70 *Id.*, 305.)"

In Helms vs. Helms, 137 N. C., 206, land was conveyed by deed in consideration of the support of the grantor for life by the grantee, and if the latter failed to support the grantor, the deed should be void. It was

claimed that the doctrine that none but the grantor can take advantage of the breach of the condition is no longer the law. After citing with approval Rush vs. Rock Island, and Nicoll vs. Railroad, supra, the court said:

> "But when a fee simple without a reservation of rents is granted upon a condition subsequent, as in this case, *there is no estate remaining in the grantor.* There is simply a possibility of reverter, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone. * * *
>
> "While it is true that contingent interests and choses in action are assignable in equity, and under our code actions may be brought in the name of the assignee *we find no case holding that a bare possibility of reverter comes within this principle.*"

In Ohio Iron Company vs. Auburn Iron Company, 64 Minn., 407, in dealing with the nature of a right of re-entry, the court said:

> "Humphreys retained no estate or interest whatsoever in the lands demised, and not even the possibility of a reverter remained in him, for the right to re-enter cannot exist as an independent condition. It only exists as an incident to an estate or interest for the protection of which it is reserved. Craig vs. Summers, 47 Minn., 189, 49 N. W., 742, and cases cited.
>
> "* * * We need not quote this statute, nor is it necessary for us to consider what force should be given to it in a proper case, for it has no applicability to the facts now before us. *The right of re-entry is not an estate or interest in land, nor does it imply the reservation of a reversion.* It is a mere chose in action, and when enforced the grantor is in through the breach of the condition, and not by reverter. Craig vs. Summers, supra."

In Warner vs. Bennett, 31 Conn., 469, land was deeded

for school purposes, upon condition that if converted to other purposes, the grantees forfeit their right therein. The interest of the grantor in the reversion was purchased by appellant. In reversing the case the court says:

> "A right of entry for condition broken is not assignable at common law, and we have no statute which makes it so. * * * The grantor or his heirs only can enter for breach of such condition. (I Wash. R. P., 451; 2 Cruise Dig., 44.) The petitioner (assignee), therefore, could have obtained no right or title to make an entry for breach of the condition, and without such entry the estate of the grantees could not be terminated, and no suit at law or in equity could be maintained against the occupant of the property."

In the case of Higbee vs. Rodeman, 129 Ind., 247, the court held to the same effect and said:

> "The property would revert, upon condition broken, to the grantor or his heirs. The right of entry or re-entry, cannot be granted over, and none but the grantor or his heirs can take advantage of them."

In Tiedeman on Real Property, Sec. 277, the author says:

> "As a general rule, therefore, only the grantor and his heirs have a right of entry upon condition broken; they lose their right if they should convey away the reversion in them. The right of entry is not an estate, *not even a possibility of reverter,* it is simply a chose in action."
>
> The words italicized were italicized by the author.

In Sexton vs. Chicago Storage Co., 129 Ill., 331, the

subject was also dealt with. While the case related to a leasehold interest nevertheless the decision of the court applies to the matter in issue here.

> "But this is held upon the ground, that under the decisions of that court (Massachusetts) the right to re-enter and forfeit the lease is a contingent reversionary estate in the property, the court having previously held, in Austin vs. Cambridgeport Parish, 21 Pick., 215, Brattle Square Church vs. Grant, 3 Gray, 142, that where an estate is conveyed, to be held by the grantee upon a condition subsequent, there is left in the grantor a contingent reversionary interest, which is an estate capable of devise. It has been suggested that these decisions are predicated upon a *local statute;* (see Tiedeman on Real Prop., Note 1, Sec. 277, and Note 1, on p. 904, 6 Am. & Eng. Ency. of Law); but whether this be true or not, *the decisions are plainly contrary to the principles of the common law.*
>
> "The right to enter for breach of condition subsequent could not be alienated, as it could have been had it been an *estate,* and Coke says: 'The reason hereof is for avoiding of maintenance, suppression of right and stirring up of suits, and therefore nothing in action entrie or re-entrie can be granted over.' See, also, 1 Comyn's Digest, title 'Assignment,' Chap. 2, p. 688; 3 *Id.* title 'Condition' (O. 1), p. 129; 4 Kent's Com. (8th Ed.), 126; 1 Preston on Estates. 20; Shepherd's Touchstone, 117.
>
> "It is said in 1 Washburn on Real Prop. (2d Ed.), 474: 'Such a right' (i. e., to enter for breach of condition subsequent) 'is not a reversion, *nor is it an estate in land.* It is a mere chose in action, and, when enforced, the grantor is in by the forfeiture of the condition, *and not by the reverter.*' To like effect is, also, Tiedeman on Real Prop., Sec. 277; 6 Am. & Eng. Ency. of Law, p. 903; Taylor on Landlord and Tenant (8th Ed.), Sec. 293; Southard vs. C. R. R. Co., 26 N. J. L., 2 (Dutch), 21; Webster vs. Cooper, 14 How., 501; Schulenberg vs. Har-

man, 21 Wall., 63; Nicoll vs. N. Y. and E. Railroad Co., 12 N. Y. (2 Kern.), 121."

In Denver & S. F. Railway Company vs. School District No. 22, 14 Colo., 327, a grant was made to the school district of certain land subject to the agreement that when no longer used for such purpose the land should revert to the grantor, his heirs or assigns. After the use of the land was discontinued various conveyances were made whereby the original grantor undertook to transfer his interest, if any, remaining in the land. In determining the legal effect of the conveyance and the rights acquired by the grantees of the original grantor, the court said:

"The legal effect of the deed first made by Magnus to appellee is clearly apparent. It was in form an ordinary quit-claim deed, and divested the grantor of all his right, title and interest in the land. The covenant providing that, when the premises should be no longer used for school purposes, the title should revert to the grantor, was clearly a limitation. The title conveyed, therefore, was a qualified fee. Whenever the event might occur upon which the limitation was based, the estate of appellee would immediately cease. Nevertheless, until the happening of that event, appellee had the same right in, and the same dominion over, the estate that it would have had had there been no limitation whatsoever. 'Yet while the estate continues, and until the qualification upon which it is limited is at an end, the grantee has the same rights and privileges over his estate as if it were a fee-simple.' State vs. Brown, 27 N. J. law, 13, 20, and authorities there cited; Tied. Real Prop., Sec. 44, 281.

"As Magnus had conveyed his entire estate, it is clear that nothing remained to him which he could convey to Peabody, unless the limitation was such as to leave him vested with an estate in reversion which could be the subject of grant. Such rever-

sion could not exist, however, unless, from the nature of the limitation it appears that the event upon which it was based, in the nature of things, *must happen.* That event was the abandonment of the use of the premises for school purposes. It is manifest that such an event might never occur. The premises might always be used for the purpose for which they were conveyed. This being true, Magnus was not vested with a reversion, or an estate in reversion, and there was nothing left to him save the mere *'possibility of a reverter.'* No interest in the estate, therefore, could pass by his deed to Peabody, and, as a matter of course, as Peabody took nothing he could convey nothing, either to McGavock or the appellant. Whether these deeds might not operate as an assignment of the reversion or the possibility of reverter it is unnecessary to determine. It is sufficient to say that they did not convey the title or vest the grantees named in them with any right or interest, either present or contingent, in the body of the land itself. Tied. Real Prop., Sec. 385; 2 Washb. Real Prop., 739.

"It follows, therefore, that Peabody was without authority to grant the license under which entry was made; that his conveyance was without legal force or effect; and that appellant took possession of the premises without right."

In Church vs. Elliott, 65 S. C., 251, certain real estate was conveyed by J. to the First Church, which through its trustees covenanted in the deed that it should be used for religious purposes only and that it would erect a building thereon, and that upon default to fulfill the covenants therein contained, "It should be lawful for the said J., party of the first part or her heirs or assigns, and she or they, or any of them, are hereby authorized and empowered to re-enter into and upon said lot of land and premises" and resume possession thereof. Default having occurred on the part of the church, the heirs of J upon

her death conveyed the property in dispute to E. The church then commenced an action to recover possession of the property from J's assignees, and one of the defenses interposed was that they as assignees, could take advantage of such breach, but the Supreme Court said:

> "The conditions in the deed here under consideration are conditions subsequent and no one but the grantor or his heirs can take advantage of the breach of such conditions. The deed is not void on breach of the conditions, but becomes so only when the grantor or his heirs enters; or if actual entry is impossible by the grantor or his heirs setting up claim to the property. Hammond vs. Railroad, 15 S. C., 34. It is true, in the deed under consideration it is expressly provided that upon breach of condition, the grantor "or his heirs and assigns" are authorized to re-enter and without notice evict any person found in possession, but it seems to be well established that parties to such conditions are not allowed to alter the settled rule of law on the subject and give the assignee of the grantor the right to avail himself of such breach. Ruch vs. Rock Island, 97 U. S., 696. Until actual breach of a condition subsequent and entry, or action equivalent to entry, when entry is not possible, the grantor or his heir has only a possibility of acquiring an interest in the land in the future, and a mere possibility of future acquisition of the title cannot be conveyed or assigned." (p. 256.)

In this particular instance the church took the property on condition that it would erect a building, and with the right of re-entry on part of the grantor, "his heirs or assigns," in case of default. In the case at bar there was also an absolute deed given with the reservation that on default of the University to buy the Dean property and erect a memorial thereon, Mayer or "his heirs or assigns" should have the right to demand a reconveyance which

is clearly equivalent to a right of entry. Upon default of the Washington Loan and Trust Company to voluntarily reconvey, as has occurred, the heir is left to his right to make demand and follow it up, as has been done by this litigation. In the church case just cited the heirs of the original grantor after breach on the part of the church conveyed the property to a third person who took possession, but the Supreme Court of South Carolina said that at most all that the original grantor had was "A possibility of acquqiring an interest in the land in the future *and a mere possibility of future acquisition of title cannot be conveyed or assigned,*" and therefore the assignee took no title. In the case at bar, Mayer had conveyed absolutely his fee and all he had at the time of his death was the possibility of again acquiring the land, and this possibility as has been shown above, as well as by all the authorities, is not such an interest as can be assigned or devised. Furthermore, in each case it was expressly provided that the property should upon default in complying with the conditions, revert to the grantor, *his heirs or assigns,* and notwithstanding such provision the court held the assignee could take no interest in the property.

In Upington vs. Corrigan, 151 N. Y., 143, the entire question was carefully considered. The suit was an action of ejectment to recover certain lands conveyed on condition that the property should be used for church purposes. The grantor died leaving a will, whereby she disposed of her estate giving a residuary legatee all her property and estate not otherwise effectually disposed of. The plaintiffs were the heirs at law of the original grantor. It was contended, based upon certain Massachusetts decisions, that the right of action for breach of a condition subsequent passed under the will to the devisees and that the heirs at law could not recover. The court disposes of the matter as follows:

"The question which this appeal presents is both interesting and important and its answer turns upon the construction to be given to the provisions of our Statute of Wills. I think, too, that there have been certain decisions made by the courts of this State upon the general question; the effect of which it would be very difficult to overlook, however much inclined we might feel to differ in our reasoning. The question is, can the plaintiff, claiming as heir at law of Mrs. Davey, maintain this action to recover the possession of the premises in question for the breach of the express condition in her grant; *or has such a right passed under Mrs. Davey's will to her residuary legatee?* The learned counsel for the appellant has argued, with ability and with force, against the plaintiff's right and the contention which he makes is that an interest remained in the grantor, which, being descendible to her heirs, was made devisable by the Revised Statutes, and, therefore, passed under her will. If it is true that the plaintiff must rest her right to enter for breach of the condition upon the descent of some estate or interest left in the grantor, then, I think, the appellants' contention is right and this action should fail. But if, on the other hand, and as argued for the respondents, the plaintiff has the right to enter, *not through the operation of the law of the descent, but merely representatively,* as heir at law, and the rule at common law has not been changed by our statutes, then, I think, we will find ourselves obliged to conclude that the devisee of Mrs. Davey was incapable of possessing a right of entry, and that it belonged solely to her privies in blood.

"At common law, the benefit of such a condition in a grant of real estate could be reserved only to the grantor and his heirs. It was not considered to be a devisable interest in the grantor and the right of re-entry for a breach could not be assigned to a stranger. It was a non-assignable right and no other person than the grantor, or his heir, could take advantage of a condition which required a re-entry in order to revest the former estate. (See Vol. IV, Kent's

Com., pp. 122, 127; Jackson vs. Topping, 1 Wend., 388, 395; Goodright vs. Forrester, 8 East, at p. 566.) The reason, quaintly given in Lord Coke's Institutes, was that 'under color thereof pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession.' (Coke upon Littleton, Sec. 347.) In Greenleaf's Cruise on Real Property (Vol. 1, title 13, Chap. 1, Sec. 15), the reason of the rule is thus given: 'That it is a maxim of law, that nothing which lies in action, entry or re-entry, can be granted over; in order to discourage maintenance.' Whatever criticisms may be made upon the reasons for the rule at common law, it must be recognized as a continuing rule of property; if not changed or done away with by the Revised Statutes. The effect of Section 17 of Article 1 of the State Constitution was to retain so much of the common law of England as formed the law of the colony of New York on the 19th day of April, 1775; where not repugnant to our form of government or inapplicable to our institutions, and subject to such alterations as the legislature should from time to time make. The appellant, feeling bound to concede that the right of re-entry was not devisable at common law, claims that the Revised Statutes have altered the law, by the provision that 'every estate and interest in real property descendible to heirs may be devised.' (2 R. S., 57, Sec. 2.) Undoubtedly, this language of the Statute of Wills is as comprehensive as it can be to cover real interests; but we are remitted, nevertheless, to the inquiry, whether, here, what the grantor had with reference to the estate she had granted amounted in law to an estate or interest in the real property and therein lies the difficulty. *At common law it was only a possibility of reverter and not a reversion.* (4 Kent, 370; Martin vs. Strachan, 5 Term. Reports, 107). Until the happening of the breach of the express condition in the deed and a revesting of the estate through re-entry, the whole title was in the grantee.

Have the Revised Statutes changed the grantor's status? In Chapter 1 Part 2 of the Revised Statutes upon the nature, qualities and alienation of estates in real property, Article 1 of Title 2 creates various estates in lands and divides them into those in possession and in expectancy. The latter class is again divided first, into future estates limited to commerce in possession at a future day, either without the intervention of a precedent estate, or on the determination of a precedent estate; and, second, into reversions; which latter are defined to exist where the residue of an estate is left in the grantor, or his heirs, commencing in possession on the termination of a particular estate granted. By Section 35 of the same article, it is, also, provided that 'expectant estates are descendible, devisable and alienable in the same manner as estates in possession.' If, therefore, there was any estate left in Mrs. Davey, upon her grant to Hughes, it was not one known to our statute on real property and all expectant estates, within which class it would have to fall, are abolished by the article, except such as therein defined and which must be either estates limited to commence in possession at a future day; or reversions. The real interest contended for here would not satisfy the requirement of either class. The mere possibility of reverter, which was all there was in this case, could not be included within the "reversions" spoken of by the statute, within its letter or spirit. The Statute of Wills, through the use of such precise words as 'every estate and interest in real property descendible to heirs,' obviously must have reference to such as are recognized by the Revised Statutes to be estates of inheritance. We would be without warrant in asserting the existence of any estate in Mrs. Davey in the premises granted to Hughes, whether at common law, or under the Revised Statutes. She had an election to enter for condition broken and she could release her right to do so. To those rights her heirs, after her decease, succeeded *by force of representation and not by descent.* There was no estate upon which the Statute of

Descents could operate; but as heirs, there devolved upon them the bundle or aggregate of the rights which resided in and survived the death of the grantor, their ancestor. Her legal personality was continued in them. An early and leading case in this State is that of Nicoll vs. New York & Erie R. R. Co. (12 N. Y., 121). That was in ejectment; where the plaintiff sought to recover the possession of certain lands, for breach of the condition upon which they had been granted by one Dederer to the railroad company. The plaintiff through sundry mesne conveyances, claimed to have acquired the rights of Dederer in the premises. I think that the case fairly presented the question which is involved in the present case; for the right of entry, if assignable by a grantor upon condition, at all, could effectually be assigned through deed as through a testamentary devise. It was held that the grantee in the original deed of the lands took a fee upon condition subsequent and the discussion turned upon whether the grantor in that deed, when he subsequently conveyed to the plaintiff's predecessor in interest, had any assignable interest in the premises. That question was answered in the negative, there having been no forfeiture. It was said that 'a mere failure to perform a condition subsequent does not divest the estate. The grantor or his heirs may not choose to take advantage of the breach, and until they do so, by entry, or by what is now made by statute its equivalent, there is no forfeiture of the estate. This was the common law, and it has not been altered by statute, so as to give a right of entry to an assignee, in any instance not coupled with a reversionary interest, as in the case of estates for years and for life, except in cases of leases, or rather of grants in fee, reserving rent.' After speaking of the change made in England by 32 Henry the VIII, Ch. 34, and in our Revised Statutes, which permitted the assignment of a right of entry in case of grants, or leases in fee, reserving rents, and of leases for lives or for years, the opinion continues: 'There was a reason for the statutory change in the

particular cases mentioned; for in them the grantor had an interest independent of the possibility of reverter? * * * But where a simple fee without a reservation of rents, is granted upon a condition subsequent, as in this case, there is no estate remaining in the grantor. There is simply a *possibility of reverter, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone.'* The question is then considered whether the grantor in the deed to the railroad company might have had an expectant estate under the Revised Statutes and it was held that the Statute has furnished a definition of the term 'expectant estates,' which shows that they are not in the least applicable to such a case. It was observed that though 'they include every *present right and interest,* either vested or contingent, which may by possibility vest at a future day, yet they do not include the mere possibility of a reverter, which the grantor has after he has conveyed in fee on condition subsequent.' Underhill vs. S. & W. Railroad Company (20 Barb., 455), was in ejectment; to recover land which had been granted to the defendant upon condition subsequent. Subsequently to the conveyance to the railroad company, the grantor therein made a deed to the plaintiff of 'the lands, premises, covenants and conditions, rights of action, interest,' etc., growing out of the first deed and its covenants. Allen, J., speaking for the court, followed the authority of the Nicoll case, and said: 'I come to the conclusion that the effect of the omission to perform the condition by the defendant was to give the grantors, or in case of their death their heirs, the right of entry; but that no action can be maintained by the assignee to recover the land, whether the breach was before or after the assignment, and that the court was therefore right in so holding at the circuit.' In Fonda vs. Sage (46 Barb., 109), Johnson, J., said, with respect to a condition subsequent in a deed: 'It seems to be well settled, upon abundant authority, that a condition in a conveyance can only be reserved for the benefit of the

grantor of the estate and his heirs, and that no stranger can take advantage of the breach of a condition.' He cites various authors and the Nicoll case, and observes that, 'until re-entry by the grantor or his heirs, the estate is not forfeited, but remains in the grantee.' In Towle vs. Remsen (70 N. Y., at p. 312), it was held, upon the authority of the Nicoll case, that the interest of a grantor upon condition subsequent is a mere possibility of reversion, incapable of assignment. 'There is no interest to assign before the breach and after that the right of entry is not capable of being transferred.' So lately as in Vail vs. L. I. Railroad Company (106 N. Y., at p. 287), it was said by the present chief judge that, 'when a conveyance in fee is made upon a condition subsequent, the fee remains in the grantee until breach of condition and a re-entry by the grantor;' and, again, 'there are no words limiting the estate conveyed, or which rebut the statutory presumption that the grantors intended to convey all their estate in the land. The possibility of reverter, merely, is not an estate in land, and until the contingency happens the whole title is in the grantee.' The deed in that case was assumed, for the purpose of the expressions, to convey upon a condition subsequent. Jackson vs. Varick (7 Cowen, 238), to which our attention is called, is not in point; for the question involved was expressly stated to be 'whether the *owner in fee* can devise land which, at the time of the devise, and of his death, is in the adverse possession of another * * * whether a person having a right of entry in fee simple, shall be said to have an estate of inheritance, in lands tenements or hereditaments, in the language of our Statute of Wills.' * * * In a case arising in the courts of the State of New Jersey, the common law rule, in question, was considered in language which I shall quote. That was the case of Southard vs. The Central Railroad Company (26 N. J. Law, at p. 21) and it was said:

"'If, however, the evidence had clearly es-

tablished a breach of the condition, and a consequent forfeiture of the estate, the plaintiff could not have availed herself of the forfeiture. She claims, not as heir, but as devisee of the grantor. She is a privy in estate, and not a privy in blood. It is a rule of the common law, that none may take advantage of a condition in *deed* but parties and privies in right and representation, as the heirs of natural persons and the successors of politic persons; and that neither privies nor assignees in law, as lords by escheat; nor in deeds, as grantees of reversions; nor privies in estate, as he to whom the remainder is limited, shall take benefit of entry or re-entry by force of a condition. (Shep. Touch. 149; Co. Lit. 214, a; Lit. Sec. 347; Doct. and Student, 161, Ch. 20; Perkins, Sec. 830; 4 Kent, 127; 2 Cruise Dig. Ch. 2, Sec. 49).' (See also, upon this subject, Schulenberg vs. Harriman, 21 Wall., 44, and Ruch. vs. Rock Island, 97 U. S., 693.)

"In this case, as it is in every case of a deed of the fee upon condition subsequent, the grantor parted with every interest and estate in the real property conveyed. That was her intention, within the legal presumption from the terms of the deed, and it was, also, the legal presumption that the condition would be performed by the grantee. That which the grantor retained was never regarded as an interest in real property, or as an assignable chose in action, and cannot be deemed such through any construction of our statute. Until the law is changed by some legislation, it must be regarded as still the settled rule that no one can take advantage of the breach of a condition subsequent, annexed to the grant of a fee, but the grantor or his heirs; or, in the case of an artificial person, its successors. Every estate and interest formerly enjoyed by the grantor were vested by the deed in the grantee. He undertook and agreed to perform the condition which is annexed

> to the grant and the presumption was that he would perform. If he, or those who succeeded in interest, failed to do so, within a reasonable time, then it became optional with the grantor to enter for a breach of the condition and to have a forfeiture of the estate declared. The grantor having died, the right to insist upon a forfeiture for breach of the condition remained in the heir, as the person who occupies the place of the deceased."

In Church vs. Young, 130 North Carolina, 8 Harris, conveyed certain land to certain trustees, in trust for a church subject to a condition that title should revert if the land should not be used for church purposes. Before forfeiture, Harris died leaving a last will and testament in which he undertook to devise all of his property of every kind and description not specifically mentioned in his will. The devisees, before breach of condition, conveyed their interests in the land and the grantees sought to recover for failure to perform the condition. The court held that after the grant and before re-entry the grantor had nothing that he could convey by his will; that at common law, before condition broken, the estate would revert to the heir at law and was not assignable. At the time the will was executed there was a law in North Carolina which provided expressly that rights of entry for conditions broken could be devised. Nevertheless, the court held that the proper construction of the statute limited the rights of entry that could be devised to such as the testator had at the time of his death; that as the condition had not been broken in his life time he had no right of entry but a mere possibility of reverter.

The court said:

> "This evidently means rights of entry for conditions broken in the lifetime of the testator, and where

> he had the right of entry *while living*. This seems to us manifestly the proper construction of this statute—such rights as he has 'at the time of his death.' And, besides, this being manifestly the proper construction of the statute, it puts the statute in harmony with the plainest principles of law governing the rights of property, as it cannot be supposed that the Legislature intended to authorize a testator *to will what he did not have.*"

In the case of Goodright vs. Forrester, 8 East 552, 566, the question was whether a right of entry was devisable under the common law. Lord Ellenborough, C J., in delivering the opinion of the court, said:

> "This brings on the consideration of the second question; which is, whether such right of entry be devisable: and we are of opinion that it is not devisable. For such right is certainly not assignable by the common law; nor does it fall within the words of the statute, 32 H., 8 c. 1., which are, 'having manors, lands, tenements, or hereditaments'; nor of the statutes 34 and 35, Hen. 8, c. 5, s. 4, which are, 'Having a sole estate or interest in fee simple of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder.' If the devise of Thomas Burton were stated upon record in any pleadings at common law, what description of interest, falling within these words, could he be stated to have had at the time of the devise? The opinion of Lord Eldon in The Attorney-General vs. Vigor, 8 Ves., Jun. 282, was certainly against it: and the case of Roe vs. Griffiths, Black. Rep., 606, Goodtitle vs. Wood, Wiles, 211, and Roe vs. Jones, 3 Term Rep., 94, do not show that such right of entry is devisable; as in those cases the *devisors devised all the interest they had ever had.* And Lord Thurlow, 1 Ves. Jun., 255, supposed, in order to bring executory interests within the statutes of wills, that they must have been considered as executed by the statute of uses; which is a very different interest from a right of entry for

> the purpose of revesting a devested estate. In Corbet's case, 1 Co., 85, b. 'For the construction of wills, this rule was taken by the justices in their arguments; that such an estate, which cannot by the rules of the common law be conveyed by act executed in his life, by advice of counsel learned in the law, such estate cannot be devised by the will of a man who is intended by law to be *inops consilii;*' from whence it may be inferred, that out of that interest, in which by act executed in a man's life it is not possible to create any estate, no estate can be created by his will. And in Butler and Baker's case, 3 Coke, 32 a., it is said, 'without question that which a man cannot dispose of by any act in his life shall not be taken for any of his manors, etc., whereof he may devise two parts by authority given him by the statute.' And in Lord Mountjoy's case, Godbolt, 17, it is laid down, 'that the statute of wills, 32 Hen., 8, that it shall be lawful, etc., to devise two parts, etc., respects only such things as are devisable;' *but a right of entry is not devisable;* and therefore, according to the terms of the statute and the authority of that case, is not devisable."

There is an elaborate note in 60 L. R. A., page 762, reviewing all the authorities upon the subject under consideration. In his summary the Annotator says:

> "Before breach (this right of entry) is a mere possibility coupled *with no interest in the land,* and, therefore, no more transferable by the act of the grantor than the possibility that he to whom he has conveyed the estate may voluntarily reconvey. The death of the grantor, however, does not extinguish the possibility and the right to take advantage of it *passes to the heir.*"

If any doubt could remain, in view of the authorities quoted, upon the proposition that such an interest as remained in Mr. Mayer could not be devised, it would seem

Belknap v Belknap, 128. Mass.

effectually and completely disposed of by the decision of the Supreme Court of the United States in two cases, not based upon local statutory law. In the case of Schulenberg vs. Harriman, 88 U. S., 44 (21 Wall), above referred to, the facts were in all respects the same as the facts in the case at bar. After deciding that the condition in that case was a condition subsequent, as above shown, the court proceeded to decide that no one could take advantage of the non-performance of the condition but the grantor or his heirs. In dealing with that proposition the court said:

> "And it is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed."

In Ruch vs. Rock Island, 97 U. S., 693, a dedication was made of land for school and churches. Upon failure to use the land for these purposes the assignees of the original owner, to whom the interest of the dedicator had been conveyed, brought suit to recover the land. The conveyance was by the children of the dedicator, who were his sole heirs at law. The court held that the grants, though made by the heirs at law, conveyed no title and the grantees were not entitled to recover, and in the opinion said:

"A few words as to the erroneous point in the charge will be sufficient. John W. Spencer was one of the original proprietors and one of the dedicators. He owned at the time of the dedication three-eighths of the premises. A conveyance was made to the plaintiff by his two children, who were his sole heirs at law. The plaintiff asked the court to instruct the jury that if his contention as to the facts was correct he was entitled to recover; and the court in the charge given instructed accordingly. It was not denied by the plaintiff that the title had passed, and that the estate had vested by the dedication. If the conditions subsequent were broken, that did not *ipso facto* produce a reverter of the title. The estate continued in full force, until the proper step was taken to consummate the forfeiture. This could be done only by the grantor during his lifetime, and *after his death by those in privity of blood with him. In the meantime, only a right of action subsisted, and that could not be conveyed so as to vest the right to sue in a stranger.* Conceding the facts to have been as claimed, by the plaintiff in error, this was fatal to his right to recover, and the jury should have been so instructed. Webster vs. Cooper, 14 How., 488; Davis vs. Gray, 16 Wall., 203 (83 U. S., XXI., 447); 1 Shep. Touch., 149; Winn vs. Cole, 1 Miss., 119; Southard vs. R. R. Co., 26 N. J. L. (2 Dutch.), 13; Rector vs. Pelham, 9 Mass., 501; Parker vs. Nichols, 7 Pick., 111; Nicoll vs. R. R. Co., 12 Barb., 480; Bk. vs. Kent, 4 N. H., 221; Cross vs. Carson, 8 Blackf., 138; Hooper vs. Cummings, 45 Me., 359; People vs. Society for Propogation of Gospel, etc., 2 Paine, 545; Underhill vs. R. R. Co., 20 Barb., 455; Shannon vs. Fuller, 20 Ga., 556; Thompson vs. Bright, 1 Cush., 428."

In the case just cited the Supreme Court of the United States went further than it is necessary for the court to go in disposing of this case. It will be noted that in that case the deed provided that upon forfeiture for breach

of condition subsequent the estate should revert to the grantors, "their heirs or assigns." Those are the identical words used in the trust agreement in this case. In the case decided by the Supreme Court, after the death of the grantor, but before forfeiture, the heirs had all undertaken to make a conveyance of the possibility of reverter or right of entry, and the court held that even the heirs at law could not make such conveyance until after breach and re-entry. It seems to us that this case controls the case at bar in every respect.

It is believed the foregoing argument demonstrates that the possibility of reverter remaining in a grantor after the grant of an estate upon condition subsequent and before breach, is not devisable but devolves upon the heir at law. We believe, however, that the nature of this transaction was such as to leave even a less interest in the grantor, if such a thing is possible, than in the case of an ordinary grant upon a condition subsequent referred to in the authorities. By his absolute deed in fee every vestige of title in the grant was extinguished. In all the cases cited in support of our contention, the interest or possibility or whatever it may be called, that remained in the grantor, was reserved, if we may so speak, *in the conveyance itself* and *required no formal reconveyance* to revest title; that is to say, a full fee simple title revested upon re-entry without any reconveyance of any character. In this case no interest was reserved by the grantor; no right of re-entry was reserved. By the terms of the trust agreement his interest and estate was not to revive upon failure of the University to perform the condition, but only after a *formal reconveyance* of the property by the trustee. Moreover, the right to reconveyance did not arise in the life time of the testator, and in fact not until 19 months after his death, and the actual reconveyance has not yet been made.

CASES IN OPPOSITION BASED ON STATUTE.

The learned counsel for the American Security & Trust Co., in substantiation of his claim that the Chevy Chase property passed to that company as trustee, under the will, has heretofore cited in support of his position the case of Hayden vs. Inhabitants of Stoughton, 5 Pick., 528, and Austin vs. Cambridgeport Parish, 21 Pick., 215, as supporting his view that the interest remaining in the grantor, before forfeiture, after a grant of lands upon condition subsequent, passes under the testator's will and did not descend to the heir at law. Neither one of these cases has any application to the case at bar.

The case in 5 Pick. seems to support the position contended for, but in reality does not, as we shall see.

In the case in 21 Pick., 215, it appears from the argument of counsel that in Massachusetts the estate would have revested immediately in the testator if he had lived without entry; that an entry is not required in that State in leases on condition, and the difference between a lease and a feoffment, namely, livery of seisin, is removed by their registry act. (P. 219.)

In the case in 21 Pick., 223, the case in 5 Pick. was referred to and the Supreme Court states:

> "The case of Hayden vs. Stoughton, 5 Pick., 528, is more fully in point, *as giving a construction to our statute authorizing devises,* and seems to be entirely decisive of this question."

In the same case the court says that under the laws of Massachusetts in force at the time no entry was necessary to revest the estate, and on page 224, the court further said:

> *"By the provision of the Revised Statutes* great and *important changes* have been introduced into our

> system in relation to real actions. * * * The demandant is no longer required to prove an actual entry under his title in those cases where such entry was necessary at common law."

The court cites the statute. In other words, from what has been stated, it is apparent that the common law had been changed in Massachusets by statute and the decision of both of the cases cited was based upon and controlled by the construction of the statutes of Massachusetts authorizing devises.

Tiedeman on Real Property, in a note to Section 277, says that the Massachusetts cases cited by counsel, 5 Pickering and 21 Pickering, are merely based upon a "local rule in Massachusetts."

In Sexton vs. Chicago Storage Co., 129 Ill., 331, the court, in dealing with the question of assignability of the estate remaining in the grantor after a grant upon condition subsequent, but before forfeiture, says:

> "But this is held upon the ground, that under the decisions of that court (Massachusetts) the right to re-enter and forfeit the lease is a contingent reversionary estate in the property, the court having previously held, in Austin vs. Cambridgeport Parish, 21 Pick., 215, Brattle Square Church vs. Grant, 3 Gray, 142, that where an estate is conveyed, to be held by the grantee upon a condition subsequent, there is left in the grantor a contingent reversionary interest, which is an estate capable of devise. It has been suggested that these decisions are predicated upon a *local statute* (see Tiedeman on Real Prop., Note 1 to Sec. 277, and Note 1, on p. 904, 6 Am. & Eng. Ency. of Law); but whether this be true or not, *the decisions are plainly contrary to the principles of the common law.*"

In St. J. & St. L. R. Co. vs. Co., 135 Mo., 192, the

court cites with approval the case of Schulenberg vs. Harriman, supra, and in referring to 21 Pick., 215, and 3 Gray, 142, says:

> "But these decisions of the Massachusetts courts have no support in the common law. The right of entry for condition broken is not an estate in lands or even a possibility of reverter; it is a mere chose in action."

Moreover, if in view of what has been stated, the two cases in Pickering relied upon by counsel, can be considered as holding that a right of re-entry *before* condition broken, may be assigned or devised, nevertheless they have been overruled by later decisions, notwithstanding the statute relating to wills which the court held, in 21 Pickering, controlled both cases.

The case cited in 5 Pick. was decided in 1827, and the one in 21 Pick. in 1838, while in Guild vs. Richards, 16 Gray, 317, decided in 1860, which was a case where there was a breach of the condition, but before the grantor re-entered, he conveyed his right, the court held in a very carefully considered opinion that a right of entry could not be alienated and that the grantee of the right had no standing until re-entry made. The entire matter is fully discussed on pp. 317-319.

To the same effect is the later case of Rice vs. R. R., 12 Allen (94 Mass.), 141, decided in 1866. The syllabus in that case is as follows: "The right or possibility of reverter which belongs to a grantor of land on condition subsequent is extinguished by a conveyance thereof by deed to a third person before entry for breach of condition, even though such conveyance be to a son of the grantor, upon the grantor's death becomes his heir," on the ground that he is estopped from making claim having conveyed his interest.

In the case of Locke vs. Hale, 165 Mass., 20, it appeared that a parcel of land was granted upon a condition, with reversion to the grantor, his heirs and assigns, in case of breach. An assignee *before breach* sought to recover the land conveyed, basing his right upon the word "assigns" in the reversion. The Supreme Court held:

> "The defendant has placed some stress on the use of the word 'assigns,' in the provision creating the encumbrance. *The right of entry for breach of a condition subsequent is not assignable,* and if the provision is to be regarded as creating a condition subsequent the word was inapt. Hopkins vs. Smith, 162 Mass., 444. We think that, if it is not to be rejected altogether, it is to be regarded as inserted rather to show that the condition or restriction was a continuing one, with a purpose to establish an easement or servitude in favor of the premises occupied by Johnson as a residence."

The Annotator who wrote the note in 60 L. R. A., 762, says that the Massachusetts cases, 5 Pick. and 21 Pick., referred to, which hold that right of entry is devisable without a statutory change in the common law, are at variance with the general rule. While he is correct in stating those decisions are at variance with the general rule, he is mistaken, however, in assuming that there had been *no change made by statute* in Massachusetts in the common law rule on the subject. As heretofore shown, it appears from the decisions themselves, that they *were based upon the statute of wills* in that State and for that reason are not authorities for or against the proposition under consideration.

The learned counsel also referred to the case of Hambleton vs. Darrington, 36 Md., 434, as supporting his contention, that such an interest as remained in Mayer after the conveyance to the Trust Company, was a de-

visable interest under the residuary clause of the will. On behalf of the complainant it is submitted that the case is not in point and that it would be a stretch of imagination to assume that by its decision in that case the Court of Appeals of Maryland intended to decide, without a single reference to the many cases bearing upon the subject, that a mere possibility of reverter before condition broken could be assigned or devised.

In that case it appears that Rachael Watson devised and bequeathed the residue of her interest to Z. Woolen in trust for her son, with a proviso that upon the death of her son without issue the estate should go to Woolen, his heirs and assigns absolutely. The question was whether under this will Woolen acquired an interest which could be devised.

In the first place, it will be observed, as stated in the argument of counsel (p. 438), the trust fund in controversy was made up entirely of *personalty* and not real estate. In the next place, the point now under consideration *was not contested,* as the court says (p. 443), "As the petitioners and respondents claim under Z. Woolen * * * *it might be assumed* that the interest of their testator or intestate was descendable and devisable."

In the third place, it will be noted the very *same instrument* that created the estate upon condition also contained a *limitation over* in case it did not vest. That, of course, created a conditional limitation which is essentially and fundamentally different from a mere right of entry before breach of condition subsequent.

> "When a condition subsequent *is followed by a gift over* upon the non-performance or other breach *it becomes a conditional limitation.*"
> 4 Kent, 126.
> 2 Jarman on Wills, 6th Ed., Note, p. 6.

The difference is material *because at common law only the heir could take advantage of a breach of condition,* while a stranger can have the benefit, without entry, of a conditional limitation.

2 Jarman on Wills, 6th Ed., Note, p. 6.

Because, therefore, in Hambleton vs. Darrington, the case related to personalty, secondly, because the point at issue in this case was not contested, and thirdly, because the interest of Woolen was a conditional limitation, the case has no application and is no authority against the proposition now contended for.

There seems to be no decided case in Maryland or in the District of Columbia bearing directly upon the question under consideration. We believe the only explanation that can be given of that fact is that the lawyers in Maryland generally, and certainly the lawyers generally in the District of Columbia, have assumed that the common law rule against maintenance is in force and that such rule forbids the assignment or devise of a mere possibility of reverter for breach of condition subsequent.

The nearest approach to the question we have been able to find in Maryland is in a recent decision of Dawson vs. Western Md. R. Co., 68 Atl. Rep., 301 (Md.), decided December 31, 1907. In that case Rowland conveyed certain property to the Canal Company in consideration and on condition that it should make provision for a basin thereon connected with a canal, to be constructed through the land. In this case appellant held title to Rowland's lands by mesne conveyance, and the Canal Company sold the canal to appellee, who closed up the basin. Appellant thereupon prayed that the railroad company be required to restore the basin and maintain the same. While the case went off on another point the court said:

"If the provision in the deed be treated as a condition, it was a condition subsequent, and the property would revert to the heirs of Rowland, and not to the appellants [the assigns of Rowland of the property], if the condition be broken." (p. 306.)

MARYLAND STATUTORY PROVISIONS.

The only statutory provisions in Maryland that have any bearing upon the subject at all, are Sec. 307, Article 93, of the Md. Code of 1888, p. 1414, which is identical with Sec. 314, of the same article of the Code of 1904, which provides as follows:

"All lands, tenements and hereditaments, which might pass by deed, *and* which would, in case of the proprietor dying intestate, descend to or devolve on his or her heirs or other representatives, except estates tail, and all goods, chattels, monies, rights, credits, or personal property of any kind, *which might pass by deed,* bill of sale, assignment or delivery, shall be subject to be disposed of, transferred and passed by his or her last will or codicil under the following restrictions."

Section 315, formerly 308, provides as follows:

"No will, testament or codicil shall be effectual *to create any interest* or perpetuity or make any limitation or appoint any uses not now permitted by the Constitution or laws of the State."

Section 329, formerly 321, article 93 of the Code, is as follows:

"Every last will and testament executed, in due form of law after the first day of June, 1850, shall pass all the real estate which the testator had at the time of his death."

Section 314, formerly 307, above referred to, does not change the law in any respect because it merely permits the devise of such an interest which might pass by deed and as we have shown in Maryland such an interest as that under consideration could not pass by deed.

Section 329, formerly Sec. 321, which provides that all the real estate owned by a testator at the time of his death, shall pass by his will, does not change or alter the law with respect to the kind of interest that might be devised or its nature or extent.

In Rizer vs. Perry, 58 Md., 121, Chief Justice Alvey in disposing of the case, referred to Section 321, Article 93, of the Code of Maryland and said, "but it has never been supposed that it was the design of that provision to pass the real estate of the testator irrespective of his real intention. * * * The effect of the decision is to reassert the presumption in favor of the heir."

In Backus vs. Presbyterian Assn., 77 Md., 60, the court referred to Section 314, Article 93 of the Code, which provides that unless words of limitation are added the devise will cover the fee, says this clause in no manner changed the construction of devises of real estate in regard to the nature and extent of the estates devised, except to change the common law rule that an estate given by a general devise, without words of perpetuity or limitation, conferred a life estate only.

Section 1623 of the Code of the District of Columbia provides as follows:

> "All lands, tenements, and hereditaments, and personal estate which might pass by deed or gift, *or* which would, in case of the proprietor's dying intestate, descend to or devolve on his or her heirs or other representatives, shall be subject to be disposed of, transferred, and passed by his or her last will,

testament, or codicil, under the following restrictions."

Now it will be observed this section of the Code of the District of Columbia is radically different from Section 314, Article 93 of the Maryland laws. In the Maryland law, the lands that may be devised are expressly limited to those "which might pass by deed *and* which would, in case of the proprietor's dying intestate, descend to or devolve on his or her heirs."

In the District of Columbia, it is apparent Section 1623 was taken from Section 314, Article 93, of the Maryland laws, but was materially changed. The lands which may be devised in the District of Columbia are those which might pass by deed *or* which would, in case of intestacy, descend to or devolve on heirs. In one instance the conjunctive "and" is used while in the other the disjunctive "or" is used. Moreover the Maryland law specifically deals with "rights" that may be devised and expressly limits such rights to such as "might pass by deed."

As shown by the authorities cited, both in Maryland and elsewhere, where the common law is in force, a mere possibility of reverter is not such a right as could be assigned or conveyed by deed. For some purpose or reason the District of Columbia law makes no mention of "rights" and for that reason it has not changed the law in respect to such rights.

Sections 1011 et seq., of the Code of the District of Columbia define what estates may be held in land in the District of Columbia. These provisions are not found in the law of Maryland, but even if they were found therein and even if they are to be considered in connection with the disposition of the case on hearing, they do not in any respect change the common law in reference to the devisability of a possibility of reverter.

These provisions of the Code of the District of Columbia were taken bodily, word for word, from the laws of the State of New York. The Court of Appeals of New York had occasion to consider these provisions very carefully for the purpose of determining the identical question at bar and in Uppington vs. Corrigan, 151 N. Y., 143, hereinbefore quoted, consider the matter elaborately and with the utmost care and came to the conclusion that the statute referred to did not change the common law in this respect, that the interest remaining in the grantor was not an estate and could not be devised or assigned.

While there are no Maryland authorities directly in point, we are relieved from all difficulty by a legislative determination of the entire question. Section 307 of the Maryland Code, above quoted, contained the law in the year 1907, with reference to the property which might be devised at the date of the conveyance of this property by Mr. Mayer for the use of the University and the declaration of trust, as well as at the time of his death. This section was identical with Section 314 of the Code of 1904, which is amended and re-enacted, by the Act of March 18, 1908, Ch. 84 (Laws of Maryland, 1908, p. 264, just published), and now reads as follows:

> "(307) All lands, tenements and hereditaments which might pass by deed, and which would, in case of the proprietor dying intestate, descend to or devolve on his or her heirs or other representatives, except estates tail, and all goods, chattels, monies, rights, credits or personal property of any kind which might pass by deed, bill of sale, assignment or delivery, *and all rights of entry for condition broken, and all rights and possibilities of reverter* shall be subject to be disposed of, transferred and passed by his or her last will or codicil, *and any testator devising real or personal property subject to a condition or conditions, may devise or bequeath the*

right of entry or reverter which may arise on breach of such condition or conditions, under the following restrictions:

"Sec. 2. And be it further enacted, that this act shall take effect from the date of its passage. Approved March 18, 1908."

The part in italics were added by this act.

It will be noted that the statute now in force provides specifically that all "rights of entry *for condition broken*" shall be subject to be disposed of by will, and further there may be devised or bequeathed "the right of entry or reverter which may arise *on breach* of such condition or conditions." Thus for the first time under the laws of Maryland is recognized the right to devise a right of entry, but this right is not unlimited but is restricted to such rights *after breach* of the condition. The breach of the condition in the case at bar had not occurred at the time of Mr. Mayer's death and even under this liberal statute, which did not become a law until nineteen months after his death, it could not have been the subject of a devise, because the breach had not occurred at the time of his death.

Irrespective of any decision upon the matter as this property is located in Maryland this amendment of the statute should determine absolutely the question that the Chevy Chase property was not such as could pass under the will, under the law as in force at the time of Mr. Mayer's death.

VIEWS OF AUTHORITIES AS TO TITLE.

While not controlling, it is at least persuasive, to note the view entertained by eminent authority as to the right of the appellant to the property here involved. Thus, the answer of the Washington Loan and Trust Com-

pany, who holds this property as trustee, in the 12th paragraph, says:

> "Further answering said paragraph twelve this defendant says that it entertained the belief that as said Mayer in said Declaration of Trust provided that in the event The George Washington University should not be able to comply with the conditions of the trust that the said property should be conveyed to his 'heirs or assigns', which this defendant originally construed to mean his son, the complainant herein, and this view was expressed in a letter addressed to this defendant by the President of said University under date of July 23, 1907, a copy of which is filed herewith marked, "Defendant's Exhibit 'H'." (R., p. 22.)

Dr. Chas. W. Needham, President of the George Washington University, for whose institution the conveyance was held by the Washington Loan and Trust Company, and a lawyer of much learning and distinction, has stated in unequivocal language his opinion that the American Security and Trust Co. had no interest in this property, but that upon the default of the University to comply with the terms of the trust, it passed to Mr. Mayer's heir, the appellant herein. In his letter dated July 23, 1907, and addressed to the representative of the Washington Loan & Trust Company, in response to a demand of the American Security and Trust Co., to limit the time of the University for taking the property, he said:

> "Permit me also to call your attention to relative dates of the will under which the American Security and Trust Co. is acting, the deed to your Company and the declaration of trust, and the fact that by the express terms of the latter the property reverts to the "heir" in case of default on the part of the Uni-

versity, and does not go to the Executor." (R., p. 34.)

That the opinion of the learned President of the University was correct is fully confirmed by the numerous authorities to which reference has heretofore been made.

NO INTENTION TO DEVISE THIS PROPERTY.

There is no presumption in favor of an intention on the part of the testator to deprive his heir at law of his real estate. Such an intent must be clear and free from doubt.

In Rizer vs. Perry, 58 Md., 121, 137, the court reaffirmed the decision of Chief Justice Alvey, who said with reference to an earlier decision: "The effect of the decision is to reassert the presumption in favor of the heir."

In Bourke vs. Boone, 94 Md., 477, the court reasserted the presumption in favor of the heir and held that notwithstanding the statute of Maryland relating to wills, the heir is not to be disinherited "except by express words or by necessary implication."

While the admitted facts set forth in the pleadings concerning the situation of the testator with reference to the execution of this trust agreement and with reference to his ownership of property at the time of executing his will and at the time of his death, cannot control unambiguous references contained in his will, they are properly to be considered in determining to what property the words used were intended to apply.

There are other circumstances enforcing this view. It is apparent from the pleadings the testator was interested in the enterprise conducted by Gates upon the Chevy Chase property. That enterprise was scientific and the trust agreement refers to an option to purchase and au-

thorizes its extension. The property was of substantial value. The bill avers, and it is not denied, that at the time of executing his will and continuously thereafter until his death, Mayer believed that the University would acquire the Chevy Chase property. The University prior to his death had in fact taken steps to sell its Van Ness property for the purpose of acquiring it. He had no expectation whatever of ever having the property come back to him. Now, it is inconceivable, under the circumstances, that if he considered he was dealing with this property as his own, that he expected to resume possession and ownership thereof, that he would have made no mention in his will of the Gates enterprise, of the declaration of trust, or of the Chevy Chase property in any way, or that he should have left no instructions for its disposition, for its improvement or for its sale, or for the extension of the option?

Now it appears that the deed and trust agreement relating to the Chevy Chase property were executed on February 5, 1907. The will of Mr. Mayer was executed on February 15, 1907, or ten days after the trust agreement. *At the time of executing the will the previous conveyance of the Chevy Chase property must have been fresh in the recollection of the testator.* The two transactions are so near together as to be practically contemporaneous and should be read together, particularly when we adopt the reasonable view that the testator must have been considering the terms of his will some days prior to the execution thereof. If the court puts itself in the place of the testator it seems to us the intention, as expressed in the residuary clause of the will, is clear. Mr. Mayer had disposed of the Chevy Chase property by absolute deed under circumstances that must have satisfied him the University would acquire the property. He then made his will, disposing of certain personal property and

certain other real property specifically, and then provided that the *rest* and residue of his estate, *not including what he had just disposed of by deed and by will,* should pass to his executor and trustee. Such a view is reasonable and just and fully accords with reason, while at the same time it does no violence to the words used by the testator and is in strict accord with the rule that the presumption in favor of the heir is not to be defeated except by clear words or necessary implication.

Had the testator first executed his will and then made the conveyance of the Chevy Chase property, it might well be assumed that when making his will he was undertaking to deal with the Chevy Chase property as part of his estate, but having *first* parted with it by absolute deed and *then* made his will when he refers to the *rest* and residue merely of his property, the conclusion seems to be irresistible that he had no intention to include in his residuary clause his mere possibility of reverter in the Chevy Chase property.

So also the words used elsewhere in the will are to be considered in arriving at the intention of the testator. We find the testator dealing with personal property of which he was in full *possession* and full *ownership*. We find him dealing with part of his real estate of which he was in actual *possession* and full ownership. In short, we find that the previous provisions of the will deal solely with property, real and personal, of which he was in actual possession and ownership and over which he had immediate power of disposition and control. The inference necessarily follows, when he refers to the rest of his estate, real and personal, he refers to that part of which he was in actual possession and full ownership, and he was not in full possession, nor did he have full ownership of the Chevy Chase property. But to remove this view from all doubt, the testator himself actually

limits the property conveyed by the residuary clause to property of which he was in full possession, his exact words being *"which I now possess."*

The same view that the testator was dealing with property in his full ownership and possession is apparent from the provision immediately following the residuary clause, as follows: "In trust * * * to collect the income, rents, issues and profits thereof and after the payment therefrom of all taxes * * * to apply the net income arising therefrom in the manner following to wit." How could the trustee collect the income, rents, issues and profits from the Chevy Chase property? It had neither power nor authority to do so until a reconveyance—certainly not before breach, and in fact has not to this day. The testator was obviously referring to property over which the trustee did have control. Moreover, there are no rents or profits from a mere expectancy or possibility of reverter. This makes the inference convincing that the testator was dealing with property in his full possession and ownership at the time he made his will.

The same idea is further enforced by reference to the provision—"In the event however that my said son shall depart this life before me * * * then I direct the executor and trustee to pay over from the balance of my estate," etc. Had the complainant died before the testator leaving no children (he has no children) this provision imposes upon the executor the immediate duty, after due administration, to pay over the balance of the estate, but the trustee could not turn over the Chevy Chase property or pay over the proceeds thereof because until forfeiture of the condition subsequent it would not have been available and the date for forfeiture was left to the discretion of the Washington Loan and Trust Company, and

was not exercised until nineteen months after his death.

So that, from these various circumstances, it follows as stated in Hambleton vs. Darrington, 36 Md., 446,

> "We think it is a fair deduction from these cases, that whenever it is apparent from the whole will, the testator was dealing with property in possession specifically, the general *residuary clause should be confined to property in which he had a present interest, and not include a mere possibility, coupled with an interest, which might never be realized;* particularly when the broader construction would operate to the prejudice of children and next of kin, and in favor of persons standing in a remote degree of relationship."

This case is stronger than that case because there the possibility was a conditional limitation, coupled with an interest, while here we have a mere possibility of reverter, without interest.

In Doe vs. Underdown, Willes, 293, the Chief Justice laid down the rule that when a testator has given away all of his estate and interest in certain lands, so that if he were to die immediately nothing remains undisposed of, he cannot intend to give anything in those lands to his residuary beneficiary.

In Wright vs. Hall, cited in Doe vs. Underdown, above referred to, Lord King said:

> "The testator makes his will as if he were to die that moment, and it cannot be presumed that he intended to devise a contingency which afterwards happened and which he could not foresee."

As above stated the learned counsel for the American Security & Trust Co. referred to Hambleton vs. Darrington in support of his contention that the interest remaining

in Mr. Mayer was devisable. We have shown that the interest in that case was a conditional limitation, relating to personalty. That same case, however, is an authority in support of the complainant's contention that the testator never intended to devise his possibility of reverter in the Chevy Chase property.

In that case, the Court said:

> "The effect of the words 'all the rest and residue of my estate' was held to be limited by the words 'chattels, real and personal' succeeding, in the case of Markant vs. Twisden, 1 Equity Cases, 211; the latter confining the former to things of a like kind, and *therefore a reversion in lands was excluded.* So in Doe, dem. Bunny, vs. Rout, 7 Taunt, 79, the words 'all my stock in trade and every other thing, my property of what nature or kind soever, to and for her own proper use' were held not to convey land.
>
> "In Walters vs. Walters, 3 H. & J., 204, it was held the words 'all the remainder of my estate,' were limited by preceding words to the personal estate, and *the reversion in fee,* not being disposed of, descended to the heir-at-law.
>
> "In McChesney vs. Bruce, 1 Md., 346, the words 'all the residue of my estate' were confined to personalty, because the preceding bequests were altogether personal, upon the principle of 'noscitur a sociis'; which is but a modification of the rule, that the meaning of the words is governed by the intention apparent in the whole will.
>
> "In the first case, Ch. J. Chase says, 'In deciding on the operation and effect of these words, the Court must consider the whole will for the purpose of ascertaining the intention of the testator.'
>
> "The same reason will apply, not only to the kinds of property whether real or personal, but to the nature of the estate, *whether in possession or expectancy.*

"The case of Cook vs. Oakley, 1 Peere Wms., 302, shows that the will made at sea, by a man not aware that he had succeeded to a leasehold estate, by the death of his father, would not pass the leasehold to the legatee under the words 'and all things not before bequeathed,' but should be confined to things 'ejusdem generis.'

"We think it is a fair deduction from these cases, that whenever it is apparent from the whole will, *the testator was dealing with property in possession specifically, the general residuary clause should be confined to property in which he had a present interest, and not include a mere possibility, coupled with an interest, which might never be realized;* particularly when the broader construction would operate to the prejudice of children and next of kin, and in favor of persons standing in a remoter degree of relationship."

There is another observation that may be considered. By the terms of the trust agreement it was provided that in the event the University failed to acquire the Dean property, the Chevy Chase property should be reconveyed to Mr. Mayer "his heirs or assigns." These words evidently indicate the nature and extent of the estate to be reconveyed rather than the person to whom the reconveyance should be made. But whether that be so or not, a non-professional man would never have supposed that he was making an assignment of such an interest when executing his will. Had the trust agreement directed the reconveyance to the testator's heirs, executors, administrators or assigns, the inference would have been different particularly when we consider the possibility of a sale to Mr. Gates and that the trustee would have had money, instead of property to reconvey. It follows therefore that if these words indicate the person to whom the property should be conveyed, rather than the nature of the estate

to be conveyed, that the testator did not have in mind his executor and trustee under his will. This is necessarily so, and the words used in the trust agreement regarding a reconveyance is practically a direction to reconvey to the heir, inasmuch as the interest of the testator, before breach, was not assignable.

This view is supported by the case of Locke vs. Hale, 165 Mass., 20. It appeared that a parcel of land was granted upon a condition, with reversion to the grantor, his heirs and assigns, in case of breach. An assignee before breach sought to recover the land conveyed, basing his right upon the word "assigns" in the reversion. The Supreme Court held:

> "The defendant has placed some stress on the use of the word 'assigns,' in the provision creating the encumbrance. The right of entry *for breach of a condition subsequent is not assignable,* and if the provision is to be regarded as creating a condition subsequent the word was inapt. Hopkins vs. Smith, 162 Mass., 444. We think that, if it is not to be rejected altogether, it is to be regarded as inserted rather to show that the condition or restriction was a continuing one, than with a purpose to establish an easement or servitude in favor of the premises occupied by Johnson as a residence."

Moreover, to sustain the decision of the lower court and tie up the property here involved until appellant reaches 48 years of age, does violence to the rule of law so frequently laid down by the highest court of the State of Maryland, and as so clearly stated in the case of Mercer vs. Safe Deposit Company, 91 Md., 114, that "The law favors the early vesting of estates. This is a familiar rule of law which has been frequently recognized and enforced in the decisions of this court."

We therefore submit that by the residuary clause of the will the testator did not intend to dispose of the Chevy Chase property.

NO INTENTION TO PASS MACHINERY AND PLANT.

A complete answer to the claim that Mr. Mayer intended by the residuary clause of his will to pass this property, lies in the fact that a very large proportion of its value is in the plant and machinery located at Chevy Chase and transferred by him to the Washington Loan and Trust Company, and now held by it. In this connection it should be borne in mind that this property consisted not alone of real estate, but of a scientific plant, machinery and patents, as well.

That Mr. Mayer was interested in scientific matters is apparent from the record, and that he well knew the value of the machinery and plant at Chevy Chase was materially enhanced by its maintenance as a running plant must be conceded. Bearing this in mind, it is impossible to conceive that he would have ever permitted this machinery and plant to be turned over to his executor and trustees, to be dismantled and by it disposed of as junk, as will necessarily be the case in the event of the affirmance of the decree. The fact that he was interested in scientific and educational matters is demonstrated beyond peradventure by the fact that he was willing to make this magnificent gift of land, plant, machinery and patents to the University for educational purposes, and that it was his desire that they should be used and maintained for scientific purposes, cannot be denied. If the property passes to the American Security and Trust Company under the will, but two things can result with this very large part of the value involved in this litigation,

to-wit: 1st, hold the machinery and plant for eighteen years until the beneficiary reaches forty-eight, at which time by reason of the rust and decay it will be valueless, or its care and maintenance in the meantime will be such as to entirely eat up its value, to say nothing of its becoming obsolete; or, 2d, dismantle and sell it as junk, which is the only thing possible that can be done, since it is susceptible of scientific uses only.

We submit that the very thought that this valuable plant was to be dismantled, would never have entered into his mind and could not have at the time of making his will. It is inconceivable that Mr. Mayer should have been silent in his will with reference to the disposition of this machinery and plant, had he in mind any thought that its maintenance was not to continue but that it was to pass under its residuary clause. If the value of this plant and machinery was inconsequential, there might have been some question, but such is not the case.

Is it not reasonable to suppose that in making his will Mr. Mayer had in mind the disposition of the property then actually in his possession and not that which he had ten days prior thereto otherwise disposed of, and for which provision had been made, in the event of the possibility happening that the University did not acquire it, that it should pass to his son as heir. Is it not also reasonable to suppose that he had in mind that his son being of the same blood had inherited some of his father's fondness for scientific research, and is it not likewise reasonable to assume, in the absence of any mention of the property in the will, that he had in mind that the University should first have the opportunity to obtain possession of this valuable plant and in the event of default, that his son and sole heir might continue investigations along the same line as his father.

APT WORDS WERE NOT USED.

The residuary clause of the will provides that the rest and residue of the testator's estate, *"which I now possess,* or which may hereafter be acquired by me," should go to his executor and trustee.

The interest in the Chevy Chase property remaining in Mr. Mayer after the execution of his deed was not even a legal expectancy, such an expectancy, within the meaning of the law, being something that becomes vested upon the happening of a condition *without the necessity of a formal reconveyance.* The testator limits his residuary devise "to his estate." We have shown that the testator was referring to the rest and residue of his estate which he had not previously disposed of, which of course excludes the Chevy Chase property. Moreover, he refers to estate, which, although a very broad term, yet as ordinarily understood and as understood by this testator was certainly not intended to cover a mere possibility of reverter or reconveyance. If we consider that he used the word in its technical sense, then under the decision in the case of Upington vs. Corrigan, supra, and the cases heretofore cited, we find that such an interest is not an "estate." It would seem to follow that the testator by the use of the word "estate" did not intend to cover this possibility for the reason that "estate" does not include such a possibility.

Then again, as if to emphasize this view we find the testator using a restricted residuary clause. The residuary clause used by this testator is not the clause commonly used which extends to and covers all right and interests of every nature. As stated by the Court of Appeals of Maryland, in Cole vs. Enson, 3 Md., 452, where the testator used the words "consisting of" after his residuary bequest and devise, that such words restrict the words "rest and residue."

So here, instead of resting after using the expression "residue of my estate," the testator proceeds to restrict the same by the addition of the words "which I now possess or which may hereafter be acquired by me." Having so restricted this devise, it is clear that the testator was not possessed of the Chevy Chase property, either at the time the will was executed or at the time of his death nor did he thereafter in his life time acquire the same. Did the testator, on the 5th day of February, within a week after parting with the title to the Chevy Chase property "now possess" it? Instead of enforcing the rule of construction in favor of the heir, to hold that he thereby intended to deal with the Chevy Chase property, *which he did not possess,* is to violate the rule. It not only violates the rule of construction, but it does violence to the words used. While such words have a broad meaning and broad application at times, in the light of the circumstances surrounding the testator at the time of the execution of this will and in the light of the nature of his interest in the Chevy Chase property, no doubt can remain that if he did intend to devise the Chevy Chase property he did not use apt words for the purpose. In the District of Columbia, where we have a statute defining various kinds of estate, we find (Sec. 1017 of the Code) an estate in possession, which is what the testator refers to in his will and gives to his trustee, is one in which "the owner has an *immediate right* to the possession of the land."

If we are dealing with the matter therefore according to general principles of law, as there is no controlling statute in Maryland, or if we deal with it under the statute in the District of Columbia, in which jurisdiction the testator was domiciled, we find that his interest in the Chevy Chase property was not an estate in possession, that he did not "now possess" it, to use the words of the will, because, to quote the words of the District statute,

he did not have "an immediate right to the possession of the land."

We therefore submit that even though the testator intended to devise this property, he did not use apt words for the purpose, and the decision of the lower court should be reversed.

EDWIN C. BRANDENBURG,
CLARENCE A. BRANDENBURG,
F. WALTER BRANDENBURG,
Attorneys for Appellant.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1909.

No. 1987.

THEODORE A. MAYER, APPELLANT,

vs.

AMERICAN SECURITY AND TRUST COMPANY, EXECUTOR AND TRUSTEE, ET AL., APPELLEES.

Brief of the American Security and Trust Company, Appellee.

WM. F. MATTINGLY,
Solicitor for American Security and Trust Co., Executor and Trustee.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1909.

No. 1987.

THEODORE A. MAYER, APPELLANT,

vs.

AMERICAN SECURITY AND TRUST COMPANY, EXECUTOR AND TRUSTEE, ET AL., APPELLEES.

Brief of the American Security and Trust Company, Appellee.

This case is a very simple one. Theodore J. Mayer, by deed dated February 5, 1907, conveyed certain real and personal property to the Washington Loan and Trust Company in fee, taking back from the Trust Company a declaration of the trusts upon which the property was held.

On February 15, 1907, Theodore J. Mayer executed his will. He died March 12, 1907, and his will was admitted to probate and record on March 16, 1907.

Considering the deed from Mayer to the Washington Loan and Trust Company and the declaration of trust by it as one paper, as the law holds should be done, it practically amounts to this:

Theodore J. Mayer, the testator, conveyed certain property at Chevy Chase, Md., to the Washington Loan

and Trust Company in trust to convey the same to the George Washington University "when and at such time as the University shall acquire a fee simple title to the property known as the Dean or Oak Lawn property," in the county of Washington, D. C., as a site for its university buildings and shall abandon the Van Ness property, now owned by it, as the location of said University.

Upon the conveyance of the Dean or Oak Lawn property to the University, it shall agree in writing, by authority of its board of trustees, to erect upon said Dean or Oak Lawn property, as a part of its group of university buildings, a building of stone and brick to be used for educational purposes and to be designated "The Susanna Mayer Memorial."

> "In the event of the failure of the University to comply with the terms and conditions of this trust within a reasonable time after the execution of this instrument, which reasonable time is to be determined by the trustee, then said property so as aforesaid conveyed to the trustee, is to be reconveyed to the said Theodore J. Mayer, his heirs or assigns."

The legal effect of this conveyance in trust was to put the legal title to the property in the Washington Loan and Trust Company, leaving the equitable title in the grantor, subject to be divested by the George Washington University within a reasonable time acquiring the Dean or Oak Lawn property as a site for its university buildings.

This equitable estate remaining in the testator was clearly devisable.

The Washington Loan and Trust Company fixed upon October 15, 1908, as the reasonable time within which the University was to acquire the Dean site. On that date the University notified the Trust Company that the

owners of the Dean property refused to sell to the University as they did not wish to dispose of it, and that it was therefore impossible for the University to perform the condition named in the trust.

The Will.

The testator by his will, after making a number of charitable bequests, devises and bequeaths to his son certain real and personal estate. Then follows the general residuary clause to the American Security and Trust Company in trust to pay to his son $300 per month until he attains the age of 33 years, when he is to receive $15,000. At 36 years of age he is to receive $15,000; and at 39 years, $30,000. At 42 years, $30,000; at 45 years, $30,000; and at 48 years he is to receive all the remaining trust estate absolutely in fee.

Should the son die before he shall attain the age of 48 years, leaving no child or children surving or descendants of such, then the executor and trustee is to pay over the balance of the estate to a number of eleemosynary institutions named in the will.

It is submitted that the cases where the donor conveys directly to the donee upon condition and cases of mere possibility of reverter have no application to the case at bar, yet if the testator's estate in this property was a contingency coupled with an interest or a possibility coupled with an interest, and it was all that and more, then it was devisable and passed to the residuary legatee.

4 Kent's Com., 261* states the law as follows:

> "All contingent estates of inheritance, as well as springing and executory uses and possibilities, coupled with an interest, where the person to take is certain, are transmissible by descent and are devisable."

The leading English case upon the subject is Jones *vs.* Roe, 3 Term Rep., 88.

See, also—

2 Williams Saunders, 338 k.
Doe *vs.* Weatherby, 11 East, 322.
Williams *vs.* Thomas, 12 East, 141.
Hayden *vs.* Stoughton, 5 Pick., 528.
Clapp *vs.* Stoughton, 10 Pick., 463.
Austin *vs.* Cambridgeport Parish, 21 Pick., 215.

While it is the claim of this appellee that the testator owned the equitable estate in the property in question, which was undoubtedly devisable and passed under the residuary clause of the will, yet if by possibility it should be held not to be that, then it must have been a contingent estate or possibility coupled with an interest which was also devisable.

It is respectfully submitted that the decree below should be affirmed.

WM. F. MATTINGLY,
Solicitor for American Security and Trust Co., Executor and Trustee.

Maryland Code of 1904.

Sec. 314. "All lands, tenements, and hereditaments, which might pass by deed, and which would, in case of the proprietor dying intestate, descend to or devolve on his or her heirs, or other representatives, except estates tail, and all goods, chattels, monies, rights, credits or personal property of any kind, which might pass by deed, bill of sale, assignment or delivery, shall be subject to be disposed of, transferred and passed by his or her last will or codicil, under the following restrictions."